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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 176

SHAKESPEARE COMPANY, *Petitioner,*

against

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	4
Reasons for Granting the Writ	7
Argument	9
Conclusion	19

INDEX TO APPENDIX

Appendix A—Opinion of United States Court of Claims	1a
Appendix B—Opinion of Trial Commissioner	25a
Appendix C—Order of United States Court of Claims Denying Petition for Rehearing	48a
Appendix D—Constitutional Provisions, Statutes and Regulations	50a
Appendix E—Order of Trial Commissioner Admitting Defendant's Exhibit 17 Into Evidence	54a

CITATIONS

CASES:

Alford v. *U.S.*, 282 U.S. 687 (1931)	19
Anglers Co., Ltd. v. *U.S.*, F.Supp. ; CCH ¶ 15,932 (E.D.N.Y 1970)	11
Burnet v. *Niagara Falls Brewing Co.*, 282 U.S. 648 (1931)	15
Derewecki v. *Pennsylvania Railroad Company*, 353 F.2d 436 (3rd Cir. 1965)	19

Page

Farmers' Loan and T. Co. v. *Minnesota*, 280 U.S. 204 (1930) 16
F. W. Fitch Co. v. *U.S.*, 323 U.S. 582 (1945) 8, 14, 17
Federal Trade Commission v. *The Borden Company*, 383 US. 637 (1966) 17
Gellman v. *U.S.*, 235 F.2d 87 (8th Cir. 1956) 9, 10, 11
McNabb v. *U.S.*, 318 U.S 332 (1943) 19
Power Brake Equipment Company v. *U.S.*, 68-2 U.S.-T.C. ¶ 15,850, 22 A.F.T.R. 2d 6147 (D. Ore 1968), *affirmed* _F2d _(9th Cir. May _, 1970) 12, 14
Roland Electric Co. v. *Walling*, 326 U.S. 657 (1946) .9, 10, 11
Socony Vacuum Oil Co. v. *Smith*, 305 U.S. 424 (1939) ..15
Torti v *U.S.*, 249 F.2d 623 (7th Cir. 1957) 9, 10, 11
US. v. *Redmond*, 328 F.2d 707 (6th Cir. 1964) 10, 11
West Kentucky Coal Co v. *Walling*, 153 F.2d 582 (6th Cir. 1946) 11
Worrell's Limited v. *U.S.*, 301 F.2d 317 (Ct. Cl. 1962) ..9, 11

CONSTITUTION AND STATUTES:

U.S. Const. Amend. V 2, 3

Act of June 19, 1936, c. 592, 49 Stat. 1526 (15 U.S.C. 1964 ed., Sec. 13a) (Robinson-Patman Act) 8, 18

Excise Technical Changes Act of 1958, P.L. 85-859, 72 Stat. 1275 14

Fair Labor Standards Act, 29 U.S.C., § 213(a)(2) .. 9

Internal Revenue Code of 1954—

26 U.S.C. 1964 ed., Section 4061 ..... 12, 14
26 U.S.C. 1964 ed., Section 4161 ..... 2, 3, 4, 12
26 US.C. 1964 ed., Section 4216 ..... 2, 3, 4, 5, 6, 7, 8, 12, 14, 15, 17

OTHER AUTHORITIES:

Report of the Attorney General's National Committee to Study the Anti-Trust Laws, 1955, p. 209 15-16

Temporary Treasury Regulations under the Excise Technical Changes Act of 1958, Sec. 148.1-5 (26 C.F.R. § 148.1-5(c) and (d)(1)) 3, 11

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered November 14, 1969.

OPINION BELOW

The opinion of the Court of Claims, printed in Appendix A to this petition (Infra, App. A, pp. 1a-24a),* is reported at 419 F.2d 839 and the opinion of the Trial Commissioner is printed in Appendix B to this petition (Infra, App. B, pp. 25a-47a).

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* References to the Appendix will be preceded by "App."

JURISDICTION

The Judgment of the Court of Claims was entered on November 14, 1969 (App. A, p. 24a) and a timely petition for rehearing was denied on February 20, 1970 (App. C, p. 48a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

1. Whether clear Congressional intent in imposing and in amending excise taxes levied on manufacturers (26 U.S.C. § 4161 and § 4216) is to be frustrated by an interpretation of the term "wholesale distributor" which is not in accord with the plain, ordinary and popular sense of the statutory term and which conflicts with decisions of the Circuit Courts?

2. Are purchasers who buy

(i) in small quantities, and

(ii) at established prices to retailers

"wholesale distributors" within the meaning of the constructive price provisions of 26 U.S.C. § 4216(b)(2)?

3. Are excise taxes to be imposed in a discriminatory manner among members of a competitive group?

4. Should private brand and name brand articles, made by the same manufacturer of the same material and on the same production run, which are comparable in all functional respects, be subject to the same excise tax burden?

5. Whether the due process requirements of the Fifth Amendment were violated by reliance upon evi-

dence excluded at trial or whether such reliance and the sanctioning of such reliance by the Court of Claims constituted a departure so far from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision?

STATUTES INVOLVED

The pertinent provisions of the Constitution (Fifth Amendment), the statutes (26 U.S.C., § 4161, 4216) and the Temporary Treasury Regulation (26 C.F.R., § 148.1-5(c) and (d)(1)) are printed in the Appendix (App. D, pp. 50a-54a). For the convenience of the Court, Section 4216(b)(2), which has never been passed upon by this Court, is also set forth at the outset:

> "(2) *Special rule.*—If an article is sold at retail, to a retailer, or to a special dealer (as defined in paragraph (3)), and if—
>
> (A) the manufacturer, producer, or importer of such article regularly sells such articles at retail, to retailers, or to special dealers, as the case may be,
>
> (B) the manufacturer, producer, or importer of such article regularly sells such articles to one or more wholesale distributors (other than special dealers) in arm's length transactions and he establishes that his prices in such cases are determined without regard to any tax benefit under this paragraph,
>
> (C) the normal method of sales for such articles within the industry is not to sell such articles at retail or to retailers, or combinations thereof, and
>
> (D) the transaction is an arm's length transaction,
>
> the tax under this chapter shall (if based on the price for which the article is sold) be computed

on whichever of the following prices is the lower: (i) the price for which such article is sold, or (ii) the highest price for which such articles are sold by such manufacturer, producer, or importer to wholesale distributors (other than special dealers)."

STATEMENT

The constructive price provisions of the Federal Excise Tax Section of the Internal Revenue Code of 1954 (Section 4216(b)(1) and (2)) were enacted to eliminate inequities inherent in the imposition of excise taxes on manufacturers. The Court of Claims held that petitioner qualified for relief under Section 4216(b)(2) but dismissed its petition for refund of excise taxes in an opinion which (1) recognized that Congressional intent was not being implemented (App. A, p. 9a); (2) did not accord the statutory term "wholesale distributor" its plain meaning; and (3) conflicts with decisions of the Circuit Courts.*

Petitioner is a manufacturer of fishing reels subject to Federal Excise Tax under Section 4161 of the Internal Revenue Code of 1954. The reels which Petitioner manufactures are sold either under its own trademark or trademarks of certain of its customers.

Approximately 15% of petitioner's total reel sales were made to South Bend Fishing Tackle Company ("South Bend"). The sales to South Bend were arm's length sales, and made without regard to tax benefits

* To the extent that the decision below is confined to an interpretation of Section 4216(b)(2), the conflict with the decisions of the Circuit Courts is a conflict in principle. The Circuit Court decisions relied upon do not involve interpretation of Section 4216(b)(2); those decisions, however, address themselves to the structure of federal excise taxes and to the issue of what are wholesale and what are retail transactions for the purpose of federal excise taxes.

(App. A, p. 14a). South Bend purchased reels from petitioner at a price substantially below petitioner's established price to retailers. South Bend did no manufacturing and resold petitioner's reels and those of other manufacturers to wholesalers and jobbers under its own brand name. The reels sold to South Bend were made of the same materials and on the same production run as petitioner's name brand reels and were identical in all functional respects.

With regard to reels sold by petitioner under its own trademark, petitioner, unlike its competitors, has for over sixty years followed the practice of selling primarily to retail dealers and not to wholesalers or jobbers. The Court below recognized that most of petitioner's sales were to retailers. Petitioner sold its reels at the same price to all customers, except for sales to customers who bought reels for private brand sales. Petitioner's competitors, however, historically and during the period involved followed a policy of selling reels to wholesalers and jobbers. Because of this difference in selling practice and consequent lower distributing costs, petitioner's competitors sold at a pricing level substantially below petitioner's established price to retailers. Only on the sales of reels under customer's private brand names does petitioner approach the selling practice of its competitors with regard to pricing levels.

Petitioner in computing the excise tax on sales to retailers utilized the price of its sales to South Bend as its constructive price under Section 4216(b)(2). The Internal Revenue Service asserted a deficiency against petitioner for $433,920.85, plus interest, as additional excise taxes for the period October 1, 1960 through September, 1963. Petitioner paid $20,497.44 in additional excise taxes for the period October 1,

1960 through December 31, 1960 and on denial of its claim for refund, filed suit in the Court of Claims pursuant to 26 U.S.C. §§ 6402 and 7422 and 28 U.S.C. 1491.

The case was tried before a Trial Commissioner. In rendering his opinion, recommending dismissal of the petition, the Commissioner relied heavily upon evidence previously excluded on objection at trial (App. B, p. 35a) and as to which petitioner was not afforded an opportunity to cross examine or rebut. This evidence, a non-official publication entitled the "Jobbers' Register", was admitted by an ex parte order entered long after the conclusion of trial and on the same day the Trial Commissioner rendered his opinion (App. E, p. 55a). The Commissioner's opinion, findings and recommended conclusion of law were adopted with only minor modifications by the Court of Claims.

The Court of Claims dismissed petitioner's petition for a refund (App. A, p. 24a). While the Court of Claims recognized that ". . . manufacturers excise taxes from their inception in 1932 were intended to apply as a percentage of the price at which manufacturers sold to volume purchasers, traditionally at the wholesaler level" (App. A, p. 5a) and further held that petitioner was entitled to the benefit of the constructive price provisions of Section 4216(b)(2), it denied relief on the basis of a statutory interpretation of the term "wholesale distributor" which resulted in the application of petitioner's established price to retail dealers as the price for determining petitioner's excise tax. To reach its decision, the Court held that small volume sales to four customers out of over 4,000 made at established prices to retailers and amounting to under $4,000 out of total sales of over $600,000 constituted wholesale transactions.

REASONS FOR GRANTING THE WRIT

Summary

Important questions of statutory construction are here presented which are fundamental to the structure of federal excise taxes imposed on manufacturers. The terms "wholesale" and "retail" are central to the application of excise taxes. Those terms are not statutorily defined and a conflict has arisen between the Circuit Courts and the Court of Claims as to the proper interpretation of those terms as they apply to Federal Excise Taxes. Resolution of this conflict by this Court is appropriate to afford certainty in the application of excise taxes. Moreover, Congress enacted the remedial provisions of Section 4216(b)(2) to equalize the excise tax burden among competitors selling at different levels of distribution. The result of the decision below is to curtail, if not completely deny, relief to manufacturers under that remedial section. Section 4216(b)(2), which has never been passed upon by this Court, is, therefore, in essential need of construction by this Court. Final construction of Section 4216(b)(2) and of the terms "wholesale" and "retail" for purposes of excise taxes will have great impact on the marketing structure of manufacturers subject to that tax.

Final determination is particularly appropriate in view of the express recognition by the Court of Claims that the Congressional intent and purpose of Section 4216(b)(2) was not implemented by its decision (App. A, p. 9a).

Further, there is presented for the Court's consideration the question of whether excise tax may be imposed at any price level above that of the manufacturer's wholesale selling price. A conflict (possibly involving millions of dollars of excise taxes) between the Court of Appeals for the Ninth Circuit and the Court of Claims exists on this issue.

The decision below rests, in part, upon an interpretation of this Court's decision in *F. W. Fitch Co.* v. *U. S.*, 323 U.S. 582 (1945). Because of *Fitch*, the Court of Claims indicated doubt as to whether Congress intended that the price level of private brand merchandise could be used as a constructive price to determine the tax on the sale of name brand merchandise. *Fitch* involved interpretation of the predecessor section of Section 4216(a) and held, in a situation in which the constructive price provisions of the Code were not applicable, that advertising and selling expenses were to be included in the tax base. The constructive price provisions of Section 4216(b)(2) were enacted after the decision in *Fitch*. Present for determination, therefore, are the questions of whether *Fitch* or proper construction of Section 4216(a) and Section 4216(b) permit the use of an arm's length private brand price as the constructive price for computing the tax on comparable name brand merchandise and whether the private brand price must be adjusted to include charges specified in Section 4216(a). Because of the significance of private brand transactions in the market structure of the economy, it is important that this Court determine, as it has under the Robinson-Patman Act, 15 U.S.C. 1964 ed. Sec. 13(a)) the treatment to be accorded private and name brand articles under the excise tax law.

The reliance by the Trial Commissioner on evidence excluded at trial and the adoption by the Court of Claims of the Commissioner's opinion with only minor modification present questions of whether due process was accorded to petitioner and whether the Court of Claims departed or sanctioned a departure so far from the accepted and usual course of judicial proceedings as to deprive petitioner of the rights of a fair hearing.

Under the circumstances, it is submitted that review by this Court is warranted.

I

This case involves resolution of a conflict between the Circuit Courts and the Court of Claims as to the meaning of the terms "wholesale" and "retail" in the context of Federal Excise Taxes. This conflict arises from the failure of Congress to define "wholesale" and "retail," and from uncertainty as to the application in the excise tax area of this Court's decision in *Roland Electric Co.* v. *Walling*, 326 U.S. 657 (1946) in which this Court interpreted the "retail establishment" exemption under the Fair Labor Standards Act, 29 U.S.C. § 213(a)(2).

Roland was relied upon in *Gellman* v. *U. S.*, 235 F.2d 87 (8th Cir. 1956) in which the Circuit Court, in interpreting the statute imposing excise taxes on jewelry sold at retail, adopted a common usage approach and rejected an interpretation of "sold at retail" as being the equivalent of "sale for a purpose other than resale." *Gellman* was followed in *Torti* v. *U. S.*, 249 F.2d 623 (7th Cir. 1957).

In *Worrell's Limited* v. *U. S.*, 301 F.2d 317 (Ct. Cl. 1962), the Court of Claims rejected the common usage approach of *Roland*, *Gellman* and *Torti* and appears to have adopted the approach that Congress intended that "retail" comport to the concept of "sold not for resale."

The decision of the Court of Claims in the case at bar is a logical compliment of its decision in *Worrell's*. Here the Court of Claims holds that a wholesale transaction is any sale to a person who customarily resells to others who in turn resell. No significance was accorded by the Court of Claims to the size of the trans-

action or to the pricing level at which it was made (wholesale or retail dealer level). We submit that this was error and at variance both with Congressional intent and the plain meaning of the statute.

In *U. S.* v. *Redmond*, 328 F.2d 707 (6th Cir. 1964) the narrow conceptualistic construction of the Court of Claims was squarely rejected. The Sixth Circuit looked to the common usage of the words "wholesale" and "retail" as applied to the buying and selling of merchandise and placed great emphasis on the factors of large volume bulk sales and wholesale price level in reaching its determination that the sales there involved were wholesale and not retail transactions. The Court in *Redmond* relied upon *Gellman* and *Torti* which followed the reasoning of this Court in *Roland*.

The Court of Claims' decision rests upon its conclusion, and inferences* therefrom, that four customers** out of over 4,000 were entities who customarily sold for

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* Evidence was presented at trial concerning 20 other customers of petitioner. The Court found that it was not clear whether these customers sold petitioner's products to jobbers, related or unrelated retailers or to ultimate consumers. Based on its conclusion with respect to sales to the four customers found to be wholesalers, the Court inferred that some of the 20 resold petitioner's reels to retailers in the ordinary course of business. It follows that if the four customers which the Court held to be wholesale distributors were not wholesale distributors as a matter of law, the basis for the inference vanishes.

** The Court of Claims held that at least four of the six customers referred to in Finding 10 were wholesale distributors of petitioner's reels. The Court did not identify the four customers it considered to be wholesale distributors. While petitioner does not know whether the Court of Claims considered one of these customers—Sutcliffe Company—a wholesale distributor, petitioner wishes to point out that Sutcliffe did not purchase $18,000 worth of fishing reels from petitioner, but rather as clearly illustrated by Defendant's Exhibit 1, purchased only $338.13 worth of reels.

resale and were therefore wholesale distributors. These four customers purchased in small quantities and at the same pricing level at which petitioner sold reels to its other retailer customers. *Roland, Gellman, Torti* and *Redmond* dictate that the four customers on which the Court below relied were not statutory wholesale distributors of petitioner's products. While those customers may have acted as wholesalers of the products of other manufacturers, they were not (because of the small volume and purchasing level of their purchases) in a position to perform traditional wholesale functions with respect to petitioner's products. The Court of Claims felt compelled, however, to follow the definition of wholesale distributor set forth in temporary Treas. Regs. 26 C.F.R. § 148.1-5(d)(1) (1960) ("persons who customarily resell to others who in turn resell") which it found consistent with three cases decided under the Fair Labor Standards Act. Of the cases decided under the Fair Labor Standards Act on which the Court of Claims relied only *West Kentucky Coal Co.* v. *Walling,* 153 F.2d 582 (6th Cir.. 1946) was decided subsequent to *Roland*.. It followed *Roland* by only 15 days and did not cite this Court's decision in *Roland,* but rather that of the Court of Appeals. *Roland* was not cited by the Court below and, in view of the Court of Claims decision in *Worrell,* it can only be inferred that the Court rejected *Roland.* In any event the Court of Claims decision below, following its previous decision in the *Worrell* case, results in a clear conflict between the Court of Claims and the decisions of the Circuit Courts with regard to the issue of what are wholesale and retail transactions for excise tax purposes. In *Anglers Co., Ltd.* v. *U. S.,* — F.Supp. —, CCH ¶ 15,932 (E.D. N.Y., 1970) on appeal to the Second Circuit, the Court recognized the clear conflict between the Court of Claims and the Circuit Courts.

In order to achieve uniformity in the interpretation and application of the Federal Excise Tax law, it is imperative that this Court resolve the conflict concerning the definition of wholesale and retail. Resolution of this controversy in the construction of the Federal Excise Tax law between the Circuit Courts and the Court of Claims is a matter of first impression for this Court.

II

Since the Court of Claims decision results in petitioner being forced to use as its constructive tax base the price at which it sells to retailers, an important question is presented of whether Federal Excise Tax may be imposed at any price level other than that of the manufacturer's wholesale selling price. In *Power Brake Equipment Company* v. *U. S.*, 68-2 U.S.T.C. ¶ 15,850, 22 A.F.T.R. 2d 6147 (D. Ore. 1968), *affirmed* — F.2d — (9th Cir. May 8, 1970), (not officially reported as of filing)* the Court held that the manufacturer's excise tax may not be imposed at a price level above that of the manufacturer's wholesale selling

* The particular excise tax provision involved in *Power Brake* was Section 4061 of the Internal Revenue Code which provides for a manufacturers' excise tax on the sale of automotive parts and accessories. While it is a different section of the Code from that involved here—Section 4161—the language of the two statutes is parallel except for the imposition of tax on different types of items. Thus the *Power Brake* case is direct authority in the case at bar for the imposition of the manufacturers' excise tax at no level above that of the manufacturers' established wholesale selling price. Further, *Power Brake* cannot be distinguished from this case on the basis of its involving the construction of Section 4216(b)(1) of the Internal Revenue Code as opposed to Section 4216(b)(2) of the Internal Revenue Code; the question presented in *Power Brake* was not whether 4216(b)(1) required that the manufacturers' wholesale selling price be utilized, but rather whether the imposing statute—Section 4161—required such result.

price. That case involved a corporation which conducted both a manufacturing and a distributing business of its own product. The Court held that the excise tax on the sales in the distributing business was to be computed on the basis of the corporation's established manufacturer's selling price rather than on the actual selling price of the goods to retail dealers and consumers. The plaintiff in that case had an established manufacturer's selling price of not more than 40% of list price on sales to wholesale distributors. Despite the clear Congressional intent, the government, as in the case at bar, sought to tax sales in the distributing phase of the business at the actual price at which the goods were sold to dealers and consumers. The District Court rejected the government's contention and held as follows:

> "4. It was the intent of Congress that the manufacturers' excise tax imposed under Section 4061 (b), Int. Rev. Code of 1954 should not be computed on the basis of any price in excess of the taxpayer's established manufacturer's selling price.
>
> 5. Where a corporation conducts both a manufacturing business and a distributing business, the excise tax on the sales in its distributing business must be computed not on the actual price of the sales but on the basis of the corporation's established manufacturer's selling price. See *E. Albrecht & Sons, Inc.* v. *Landy, supra,* at 207.
>
> 6. Plaintiff having made the Schedule 2, 4 and 8 sales (stocking dealers, non-stocking dealers and consumers) in its distributing business, the manufacturers' excise tax must be imposed not on the actual sales price of such sales but on plaintiff's established manufacturer's selling price of 40% of list.
>
> 7. Making the Schedule 2, 4 and 8 (stocking dealers, non-stocking dealers and consumers) sales

as a distributor in its distributing business, plaintiff is also encompassed by the provisions of Section 4216(b), Int. Rev. Code of 1954, which also require that the manufacturer's excise tax be imposed on plaintiff's established manufacturer's selling price of 40% of list. See, e.g., *E. Albrecht & Sons, Inc.* v. *Landy, supra,* at 207."

Power Brake holds that the manufacturer's excise tax is to be imposed upon the manufacturer's selling price, not on its distributing price to retailers. Significantly, the District Court reached this conclusion as a result of the imposing statute—Section 4061—and the constructive price provisions—Section 4216—were relied upon by the court as only an alternative reason. Since the Court of Claims held that petitioner must use its established price to retailers as opposed to its manufacturer's selling price in computing excise tax, the decision below conflicts with the decision of the Circuit Court in *Power Brake.* In view of the fact that the fundamental question with regard to excise tax involves the base or price level to which the tax is to be applied, it is essential that this Court resolve this conflict.

III

In *F. W. Fitch Co.* v. *U. S.*, 323 U.S. 582 (1945), this Court recognized that the excise tax provisions of the Revenue Act of 1932 provided for tax equalization among competing manufacturers in certain instances.

In 1958, Congress expanded the constructive price provisions by adopting the Excise Technical Changes Act of 1958 (P.L. 85-859, 72 Stat. 1275) which added Section 4216(b)(2). The purpose of this section was to eliminate competitive inequities arising out of the in-

clusion in the tax base of costs incurred in distributing to retailers in industries in which the normal method of distribution was to wholesalers. The Court below recognized that its decision did not implement this Congressional purpose (App. A, p. 9a).

This frustration of Congressional purpose arises solely as a result of a statutory construction which does not accord the term "wholesale" its plain, ordinary meaning. The construction below ignores the fact that Section 4216(b)(2) is a remedial statute entitled to a liberal construction. *Socony Vacuum Oil Co.* v. *Smith*, 305 U.S. 424 (1939) and that tax laws are to be liberally construed in favor of the taxpayer. Doubts are to be resolved against the government. *Burnet* v. *Niagara Falls Brewing Co.*, 282 U.S. 648 (1931).

Marketing is extremely complex. The Report of the Attorney General's National Committee to Study the Anti-Trust Laws recognized this complexity; the Court below did not. The Attorney General's Report states:

> "In our dynamic economy, classifications of buyers are often not precise or constant in meaning. At one time wholesalers, jobbers, and retailers comprised clear-cut identifiable separate links between the manufacturer and the ultimate consumer, each responsible for a clearly defined set of duties. But the needs of consumers and of business enterprises have called into being a host of distributive organizations which do not readily fit into this simple classification. Marketing functions are 'scrambled' with many permutations and combinations. Many jobbers and brokers contribute genuine services, though assuming only a part of the traditional full-time wholesaler's job which has become further subdivided. In many other areas there is a contrary tendency toward integration of distributive functions. Manufacturers often do

much of their distribution. Retailers have integrated into wholesaling, and wholesalers into retailing, either by outright ownership or by cooperative arrangements. The number of patterns is legion. Any marketing function may be performed by a specialist who does nothing else, or by an integrated concern which does more. This proliferation of modern marketing units defies neat nomenclature and descriptive labels." *Report of the Attorney General's National Committee to Study The Anti-Trust Laws*, 1955, p. 209.

Taxation is an intensely practical matter and tax statutes should be construed and applied with a view to avoiding, as far as possible, unjust and oppressive consequences. *Farmers' Loan and T. Co.* v. *Minnesota*, 280 U.S. 204 (1930). Congress intended that the price level to wholesalers be the tax base. In view of the complexities inherent in distribution patterns, it is submitted that the intended tax base can be determined only by the pricing in large volume transactions and at a wholesale price level.

Under the interpretation by the Court below, it is likely that few manufacturers, if any, will be able to obtain the relief intended by Congress.*

Therefore, there is presented an important question concerning the application of Federal Excise Tax.

IV

Petitioner maintains that South Bend was its only wholesaler because of the large volume of the transactions and of the pricing level at which they were

* Under the decision below, a sale of $1.00 to one customer who sells the item to others for resale would establish the constructive price base for sales of millions of dollars worth of merchandise.

made. The sales to South Bend were arm's length sales made without regard to tax benefits. The size of the transaction, 15% of petitioner's total sales, dictates, moreover, that these sales were made at a true manufacturer's selling price—the pricing level intended by Congress to serve as the tax base.

The Court below noted that savings to a manufacturer were inherent in selling "private brand" merchandise and interpreted this Court's decision in *Fitch* as requiring that advertising and selling costs be included in the excise tax base.

It is submitted, however, that the holding in *Fitch* and the proper statutory construction is either (i) that the constructive price provisions of Section 4216(b), where applicable, control and the charges specified in 4216(a) are not to be included or (ii) that only such charges are to be added in determining the constructive price as would bring that price to the manufacturer's f.o.b. wholesale price at the factory.

Involved here, therefore, is a determination of a basic issue of whether the price in private brand transactions may be employed in constructing the price for transactions involving name brand merchandise.* The Court below noted that the legislative history was not clear on this point. However, the taxing statute makes no distinction between name brand and private brand articles.

In *Federal Trade Commission* v. *The Borden Company*, 383 U.S. 637 (1966) this Court held that for pur-

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* Subsequent to the decision below, Rev. Rul. 70-44 was published which states that private brand and name brand articles are different articles for excise tax purposes and are to bear different tax burdens.

poses of the discriminatory pricing prohibitions of the Robinson-Patman Act (15 U.S.C. 1964 ed. 13a) a distinction between private brand and name brand merchandise could not stand.

Because of the significance of private brand transactions, it is submitted that it would now be appropriate for this Court to determine whether items comparable except for labels are the same articles for purposes of manufacturer's excise tax and should be subject to the same excise tax burden.

V

In an ex parte order (App. E, p. 54a) entered long after the close of trial, the Trial Commissioner admitted evidence which had been excluded on objection at trial—*Jobbers' Register* (Def. Ex. 17, Tr. 874)—and as to which petitioner had not been afforded the right to cross examine or rebut.* The Trial Commissioner relied heavily on this evidence in rendering his decision

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* The Trial Commissioner after stating that the *Jobbers' Register* concerned "a crucial area of proof" (Tr. 884) stated:

> "COMMISSIONER DAVIS: Without a witness who can be cross examined on just what these breakdowns are and why they're made I see no basis for letting these books in through this witness, and I will sustain the objection. However, I will permit the books to be filed with the reporter pursuant to Rule 49C1. I beg your pardon. That should be Rule 49C2.
>
> MR. WEBSTER [attorney for petitioner]: But these books are not in evidence?
>
> COMMISSIONER DAVIS: They are not in evidence. If you'll read the rule, you'll see what my ruling is, Rule 49C2.
>
> MR. WEBSTER: And they cannot be relied upon in any proposed finding.
>
> COMMISSIONER DAVIS: Well, they are not in evidence. You can make of that what you will as far as the findings are concerned." (Tr. 886)

(App. B, p. 35a). While noting in a footnote (App. A, p. 24a) that its ultimate finding of fact was not based on the evidence excluded at trial, the Court of Claims nevertheless adopted the Trial Commissioner's opinion with only minor modification. Under the circumstances, serious question is raised as to whether petitioner was accorded due process of law. *Alford* v. *U. S.*, 282 U.S. 687 (1930); *Derewecki* v. *Pennsylvania Railroad Company*, 353 F.2d 436 (3rd Cir. 1965).

It is submitted, furthermore, that the Court of Claims in adopting the Trial Commissioner's opinion sanctioned a departure so far from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. *McNabb* v. *U. S.*, 318 U.S. 332 (1943). Civilized standards of procedure and evidence were violated.

CONCLUSION

Under all the circumstances hereinabove set forth, it is respectfully prayed that the Writ of Certiorari should be granted.

Respectfully submitted,

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T. NEAL COMBS
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed a copy of the attached petition with appendices to the Honorable Erwin N. Griswold, Solicitor General of the United States, Department of Justice, Washington, D. C. 20530 with sufficient postage attached.

This 21 day of May 1970.

Jerry D. White

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 448–65

(Decided November 14, 1969)

SHAKESPEARE COMPANY v. THE UNITED STATES

George D. Webster, attorney of record, and *John Howard,* for plaintiff. *Philip L. Hummer* and *T. Neal Combs,* of counsel.

Gilbert W. Rubloff, with whom was *Assistant Attorney General Johnnie M. Walters,* for defendant. *Philip R. Miller* and *Joseph Kovner,* of counsel.

Before COWEN, *Chief Judge,* LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, *Judges.*

Opinion

PER CURIAM: This case was referred to Trial Commissioner James F. Davis with directions to make findings of fact and recommendation for conclusions of law under the order of reference and Rule 57(a) [since September 1, 1969, Rule 134(h)]. The commissioner has done so in an opinion and report filed on December 5, 1968. Exceptions to the commissioner's findings of fact and recommended conclusion of law were filed by plaintiff. Defendant requested that the court adopt the commissioner's opinion and findings of fact with a single requested modification in the opinion. The case has been submitted to the court on oral

argument of counsel and the briefs of the parties. Since the court agrees with the commissioner's opinion, findings and recommended conclusion of law, with minor modifications, it hereby adopts the same, as modified, as the basis for its judgment in this case as hereinafter set forth. Therefore, plaintiff is not entitled to recover and the petition is dismissed.

Commissioner Davis' opinion, as modified by the court, is as follows:

Plaintiff seeks to recover part of the excise taxes it paid for 1960 as a manufacturer of fishing reels.[1] Plaintiff was subject to tax under section 4161 of the Internal Revenue Code of 1954 at the rate of 10% of the price for which it sold its reels. Plaintiff sold reels bearing its "Shakespeare" trademark to volume purchasers at discounts of 51-to-55% off list, depending on quantity purchased. It offered the same price terms to all its customers. Most of plaintiff's customers were retailers. Some, however, were distributors who resold to retailers. Plaintiff also sold private-brand reels to several customers who in turn resold under their own trademarks. One such customer was South Bend Tackle Company (hereafter "South Bend"), to whom plaintiff sold reels, substantially identical to "Shakespeare" reels, at 70% off list price of comparable "Shakespeare" models.

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[1] The Internal Revenue Service asserted a deficiency against plaintiff of $433,920.85, plus $69,805.27 interest, for additional excise taxes for the period October 1, 1960 through September 30, 1963. Plaintiff paid $20,497.44, for the period October 1, 1960 through December 31, 1960, and sues here for refund.

The issue is whether plaintiff is entitled under section 4216(b)(2) of the 1954 Code[2] to compute its tax liability for "Shakespeare" reels on the price for which it sold private-brand reels to South Bend. In a word, section 4216(b)(2) for the period in suit provided a special constructive sales price rule for manufacturers (otherwise qualifying for its use) who sold to retailers and one or more wholesalers. The rule is that the manufacturer's excise tax on a taxable article is computed on the lesser of (1) the actual selling price of the article or (2) the highest price for which such article is sold by the manufacturer to wholesale distributors. Plaintiff says it has met all conditions necessary for application of section 4216(b)(2) and the proper constructive sales price for "Shakespeare" reels is 70% off list.

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[2] See. 4216 * * *

(b) CONSTRUCTIVE SALE PRICE.—

* * * * * * * * * * *

(2) SPECIAL RULE.—If an article is sold at retail * * * [or] to a retailer * * * and if—

(A) the manufacturer, producer, or importer of such article regularly sells such articles at retail [or] to retailers * * * as the case may be,

(B) the manufacturer, producer, or importer of such article regularly sells such articles to one or more wholesale distributors * * * in arm's length transactions and he establishes that his prices in such cases are determined without regard to any tax benefit under this paragraph,

(C) the normal method of sales for such articles within the industry is not to sell such articles at retail or to retailers, or combinations thereof, and

(D) the transaction is an arm's length transaction,

the tax under this chapter shall (if based on the price for which the article is sold) be computed on whichever of the following prices is the lower: (i) the price for which such article is sold, or (ii) the highest price for which such articles are sold by such manufacturer, producer, or importer to wholesale distributors * * *.

The Commissioner of Internal Revenue (hereafter "Commissioner") computed plaintiff's tax liability for "Shakespeare" reels on basis of prices equivalent to 51-to-55% off list.[3] Defendant contends this was correct because some of plaintiff's purchasers of "Shakespeare" reels at 51-to-55% off list (those who resold to retailers) were "wholesale distributors" and that the sales prices to them therefore established the "highest price" for which such articles were sold by plaintiff "to wholesaler distributors," within the meaning of the statute.

Plaintiff, on the other hand, contends that because it sold "Shakespeare" reels to all its customers on equal price terms and at a maximum 55% discount off list, all its sales were in effect sales "to retailers"; and therefore South Bend was its sole "wholesale distributor." Plaintiff contends further that the normal method of sales of fishing tackle in the industry is not to sell at retail or to retailers; that sales to South Bend were arm's-length transactions; and that "Shakespeare" and "South Bend" reels are identical articles for purposes of section 4216(b)(2).

For reasons discussed below, it is held that plaintiff is not entitled to recover because its price of 51-to-55% off list is, for purposes of the statute, "the highest price * * * to wholesale distributors"; and therefore its tax liability for "Shakespeare" reels was properly computed by the Commissioner. It is unnecessary to discuss other issues, save one, which, as noted below, defendant raises at the threshold.

The Statute

Section 4216(b)(2) was added to the 1954 Code by the Excise Tax Technical Changes Act of 1958 (hereafter "Changes Act") to supplement what is now section 4216(b)

[3] There is no issue here regarding the price on which plaintiff's sales to South Bend should be taxed. Defendant agrees that the actual selling price, *i.e.*, about 70% off list, is the proper base.

(1) (then 4216(b)). By way of background, manufacturers excise taxes from their inception in 1932 were intended to apply as a percentage of the price at which manufacturers sold to volume purchasers, traditionally at the wholesaler level. Congress early recognized, however, that competitive inequities were created among manufacturers of like goods who sold at different levels of distribution. *E.g.*, a manufacturer which sold at retail rather than to wholesalers charged a higher price for its goods because of increased expenses of distribution at retail. Thus the excise tax paid was accordingly higher, in effect, penalizing the manufacturer for its method of distribution. To correct this, Congress enacted section 4216(b) (present 4216(b)(1)) which provides, among other things, a constructive sales price for manufacturers who sell at retail. In essence, the Commissioner is authorized to compute the tax on basis of a constructive sales price which is the price for which such articles are sold "in the ordinary course of trade by manufacturers or producers thereof." Generally, the effect of section 4216(b) (present 4216(b)(1)) is to lower the tax base on goods sold by manufacturers at retail.

Section 4216(b), however, did not include a like provision for manufacturers who sold to retailers. Many manufacturers considered this an inequity since sales to retailers, like sales at retail, entail higher costs due to increased distribution expenses. At hearings preceding enactment of the Changes Act, there was considerable testimony, and a number of proposed solutions, presented by manufacturers. Generally, the proposals would have amended section 4216 (b) to include sales "to retailers," as well as sales "at retail"; or would have eliminated expenses of distribution to retailers from the tax-base price. It was pointed out, however, that any amendment to section 4216(b) which required the Commissioner to determine prices of manufacturers in the ordinary course of trade, or costs of distribution to retailers, would create an undue administrative burden on the Internal Revenue Service. Congress therefore rejected

such proposals and, instead, enacted section 4216(b)(2) which requires no administrative determination by the Commissioner of either manufacturer's price in the ordinary course of trade or manufacturer's costs of distribution to retailers or at retail. Rather, section 4216(b)(2) provides for determining tax-base price on basis of the particular sales practices of the manufacturer seeking to invoke the section.[4]

In connection with the Technical Changes Act of 1958, *supra*, the Ways and Means Committee acknowledged that because of significant administrative problems it would be difficult to achieve uniformity of base for purposes of the manufacturers excise taxes. For this reason, no attempt was made in the bill to fully achieve this goal. (H. Rep. No. 481, 85th Cong., 1st Sess., p. 21 (1958–3 Cum. Bull. 372, 392)). See similar statement in the Senate Finance Committee report (S. Rep. No. 2090, 85th Con., 2d Sess., p. 22 (1958-3 Cum. Bull. 584, 605)).

By its terms, section 4216(b)(2) requires, among other things, that a manufacturer sell at retail or to retailers, and also to one or more wholesalers, in arm's-length transactions. If this condition is met, the inquiry then focuses on the highest price at which the manufacturer sells to wholesalers. If lower than the price at retail or to retailers, it becomes the constructive price upon which sales at retail or to retailers is based. In this way, the tax-base price is

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[4] Taxpayer cites a number of cases which involved only Section 4216(b)(1), not Section 4216(b)(2). See *Power Brake Equipment Co.* v. *United States*, 22 A.F.T.R. 2d 6147 (D. Ore. 1968, on appeal to the Court of Appeals for the Ninth Circuit); *E. Albrecht & Sons* v. *Landy*, 114 F. 2d 202 (8th Cir. 1940); *Boise National Leasing, Inc.* v. *United States*, 389 F. 2d 633 (9th Cir. 1968); *Quaker City Iron Works, Inc.* v. *United States*, 256 F. Supp. 450 (E.D. Pa. 1966). Section 4216(b)(1) contains the different concept of "the price for which such articles are sold, in the ordinary course of trade, by manufacturers and producers thereof". As indicated in the text, this concept plays no role in Section 4216(b)(2).

lowered to reflect more nearly the purpose of Congress to eliminate therefrom distribution costs to retailers or at retail.

Normal method of industry sales

One condition of section 4216(b)(2) is that the normal method by which manufacturers in an industry sell taxable articles must be other than at retail or to retailers. The reason for this is that Congress felt there is no substantial discrimination in tax burden among manufacturers in an industry where most sales are to retailers or at retail. Thus, only where a manufacturer sells at retail or to retailers, in an industry predominantly selling to wholesalers or jobbers, is section 4216(b)(2) intended to apply.

As a threshold argument, defendant says plaintiff has failed to prove that most manufacturers of fishing reels in 1960 sold their products other than at retail or to retailers. Plaintiff, on the other hand, says it has proved that in 1960 most fishing tackle manufacturers sold to wholesalers. The evidence supports plaintiff. While it is admittedly difficult to prove industry selling practices, due to paucity of published information and reluctance of most manufacturers to disclose customer lists and sales practices, plaintiff has come up with trade association statistics for 1960 which are probative and reliable. (Finding 7(a).) Testimony of witnesses familiar with the fishing tackle industry in 1960 corroborate the statistics. Defendant offered no contrary evidence. Under the circumstances, therefore, plaintiff has carried its burden of proof on this point.[5]

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[5] The legislative history of § 4216(b)(2) shows that Congress intended the section to apply only when half or more of the sales of manufacturers in an industry were sales to other than retailers or at retail. See H.R. Rep. No. 481, 85th Cong., 2d Sess. (1958-3 Cum. Bull. 372, 394).

Later, Congress recognized the difficulty of proving industry distribution practices; and in 1962, it amended § 4216(b)(2) to obviate this requirement, except for certain industries not including the fishing tackle industry.

Sales of "Shakespeare" reels to "wholesalers"

Defendant's principal argument, and one deemed dispositive here, is that plaintiff sold "Shakespeare" reels to wholesale distributors, as well as retailers, at 51-to-55% off list; and therefore such price is the "highest price" for which such articles were sold by the manufacturer "to wholesale distributors," within the meaning of section 4216 (b)(2). Thus, defendant considers it immaterial that plaintiff sold comparable reels to South Bend at a lower wholesale price since it is the highest, not the lowest, wholesale price which governs application of section 4216(b)(2). The evidence supports defendant and shows that, notwithstanding its sales policy of equal terms to all customers, plaintiff sold "Shakespeare" reels at 51-to-55% off list to distributors who warehoused them and sold them through catalogs and outside salesmen to retailers on a regular basis and at markups comparable to other goods.

Plaintiff says such sales were not "wholesale transactions" because the price charged was the same as the price to retailers; and that it is unrealistic and contrary to the intent and purpose of section 4216(b)(2) to consider a manufacturer's price to retailers also to be its highest price to wholesale distributors. Neither the statute and its legislative history nor the regulations support this view. The regulations[6] define "wholesale distributors" as "persons who customarily resell to others who in turn resell," a definition consistent with pertinent case law. See *West Kentucky Coal Co.* v. *Walling*, 153 F. 2d 582, 585 (6th Cir. 1946); *Zehring* v. *Brown Materials*, 48 F. Supp. 740, 743 (S.D. Cal. 1943). Several of plaintiff's customers fit this well-established definition. Furthermore, wholesale price has been defined as the price which a retailer pays in expectation of obtaining a higher price by way of profit from

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[6] Temporary Treas. Regs., 26 C.F.R. § 148.4-5(d)(1) (1960), under the Excise Tax Technical Changes Act of 1958, 72 Stat. 1275.

the ultimate consumer. *Guess* v. *Montague*, 51 F. Supp. 61, 65 (E.D.S.C. 1942). The record shows that despite plaintiff's selling policy, some wholesalers bought "Shakespeare" reels and resold them to retailers, similarly to other goods, to realize their usual profit.[7]

With respect to the purpose of the statute, plaintiff admittedly made most of its sales of "Shakespeare" reels to retailers. Thus, to the extent that plaintiff's price of 51-to-55% off list includes costs of distribution to retailers, congressional purpose of section 4216(b)(2) is not realized to the fullest extent. However, as above noted, Congress considered, but rejected, proposed legislation which would have directly eliminated costs of distribution to retailers from the tax-base price, and Congress also recognized that it was not attempting to achieve fully the goal of complete conformity. While Congress may have hoped section 4216 (b)(2) would normally reach the same result, its plain meaning, as applied to the facts here, fails to do so. Courts are powerless to rewrite tax statutes, however appealing it may be. *F. W. Fitch Co.* v. *United States*, 323 U.S. 582 (1945); *Helvering* v. *Rebsamen Motors, Inc.*, 128 F. 2d 584 (8th Cir. 1942).

Plaintiff further says that even if it sold "Shakespeare" reels to wholesale distributors, the sales were *de minimis* and should be ignored. It is not clear from the record what quantity of "Shakespeare" reels passed through distributors to retailers. The evidence shows that at least four of plaintiff's customers were wholesale distributors who resold plaintiff's "Shakespeare" reels to retailers in their ordinary course of doing business. There is also evidence that about 20 plaintiff's other customers were considered in the trade to be jobbers. To what extent such jobbers resold

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[7] This can no doubt be explained by the fact that some retailers in 1960 sold to consumers at or near list price. Therefore, a wholesaler, buying from plaintiff at 55% off list, could resell to a retailer at 10-25% markup and the retailer could in turn resell to a consumer at a fair profit.

"Shakespeare" reels to retailers is not clear. It is a fair assumption, however, based on evidence of sales practices of plaintiff's abovenoted four customers, that some jobbers resold "Shakespeare" reels to retailers in their ordinary course of business. In any event, the statute does not require sales to wholesalers to be large in quantity. Rather, the legislative history indicates that Congress intended sales to even one wholesaler, if regularly made, to be sufficient to establish a wholesale price.[8]

Finally, plaintiff says it is discriminated against vis-a-vis its competitors if it is not permitted to lower its tax base for "Shakespeare" reels to 70% off list. The record shows that in 1960 plaintiff's major competitors sold their name-brand reels primarily to wholesalers at about 60-to-65% off list. However, there is no evidence that plaintiff and its competitors set equal list prices on comparable goods, and thus no real way to compare tax bases and therefore excise tax paid. Thus, what plaintiff seeks is not an end to discrimination but a lowering of its tax base below its competitors by using as a constructive price its lowest, not highest, price to wholesale distributors. Congress intended no such result in the operation of section 4216(b)(2).

A final point: Defendant says name-brand "Shakespeare" reels and private-brand "South Bend" reels, albeit physically similar, are different articles for purposes of section 4216(b)(2); and thus in no event can plaintiff's price to South Bend be the constructive price on which to tax sales of "Shakespeare" reels. In essence, defendant's argument is that, because of reduced selling and advertising costs, plaintiff's price to South Bend was lower than any contemplated by Congress as a constructive "wholesale" price for name-brand goods.

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[8] H.R. REP. No. 481, 85th Cong., 2d Sess., *supra* (1958–3 CUM. BULL. 394); S. REP. No. 2090, 85th Cong., 2d Sess. (1958–3 CUM. BULL. 584, 607).

This argument need not be discussed in detail. However, it is noted that the evidence shows that plaintiff realized significant savings in advertising, distributing and packaging costs by selling reels as private-brand merchandise to South Bend rather than as "Shakespeare" reels. (See finding 6.) In view of *Fitch Co.* v. *United States, supra,* which holds that advertising and selling costs must be included in the excise tax base; and in view of section 4216(a), 1954 Code, which says that packaging expenses must be included in the price base, there is doubt whether Congress, under the facts here, intended section 4216(b)(2) to operate to reduce the tax base on name-brand merchandise to the price level of private-brand merchandise. The legislative history is not clear on this point, although the question of tax treatment of private-brand merchandise was noted generally during hearings on the Changes Act. See *Excise Tax Technical and Administrative Problems, Hearings Before a Subcomm. of the House Comm. on Ways and Means,* 84th Cong., 1st Sess., at 248, 397 (1955).

In sum, it is held that section 4216(b)(2) here applies; that plaintiff sold "Shakespeare" reels to wholesale distributors, its highest price being 51-to-55% off list; and that, therefore, the excise tax on "Shakespeare" reels was properly based on the sale price 51-to-55% off list.

Findings of Fact

1. Plaintiff, Shakespeare Company, is a Michigan corporation, with its principal office in Kalamazoo, Michigan. Plaintiff manufactures and sells fishing reels which are subject to the manufacturer's excise tax under section 4161 of the Internal Revenue Code of 1954.

2. On February 12, 1965, the District Director of Internal Revenue, Detroit, Michigan, asserted against plaintiff an assessment of $433,920.85, plus interest of $69,805.27, for additional excise taxes on the sale of fishing reels for the

period October 1, 1960 through September 30, 1963. On February 23, 1965, plaintiff paid $20,497.44, representing the assessment for the last quarter of 1960 (October 1, 1960 through December 31, 1960), the tax period in suit. On March 18, 1965, plaintiff filed a claim for refund of such tax paid, plus interest. The petition in this court was timely filed on December 29, 1965.

3. From 1959 to 1963, plaintiff sold its fishing reels to about 5,500 customers. It sold reels under its own trademark "Shakespeare," and also to private-brand customers who in turn resold under their own trademarks. Plaintiff, by its own estimate, accounts for about 20% of the fishing reels sold in the United States. In the fourth quarter of 1960, the tax period here in issue, plaintiff made and sold 63 different models of reels under its trademark "Shakespeare" to about 4,000 customers. Sales for that quarter of both "Shakespeare" and private-brand reels amounted to $673,974.07, of which about 15% were private-brand sales to South Bend Tackle Company, Inc. (hereafter "South Bend"), a company independent of and not affiliated with plaintiff. Included in sales for the tax period in question were the following:

Purchaser	Private-brand reels	"Shakespeare"-brand reels	Total
Sears, Roebuck & Co.	$48,785.11	$4,901.45	$53,686.56
Montgomery Ward Co.	9,935.89	10,882.11	20,817.98
South Bend Tackle Co., Inc.	95,468.21	None	95,468.21
Total	154,189.21	15,783.56	169,972.75

4. (a) During the period in issue, plaintiff employed 26 full-time commissioned salesmen (and three sales trainees), located throughout the United States, who concentrated on selling plaintiff's "Shakespeare"-brand products to retail outlets. Plaintiff's products were, however, sold to any business demonstrating an ability to pay. Plaintiff's sales-

men and officers, though familiar with the general nature of its customers and their businesses, maintained no records regarding the specific distribution methods used by its customers.

Except for the six firms noted in finding 10, there is no evidence how plaintiff's customers further distributed the "Shakespeare" reels purchased from plaintiff, *i.e.*, whether sold to retailers or directly to consumers. Though some of plaintiff's officers testified that 98% of plaintiff's sales of "Shakespeare" reels were to retailers, there is no evidence, based on plaintiff's customer list for the period in issue, either (a) that 98% of plaintiff's customers sold directly to consumers or (b) that 98% of the reels sold to plaintiff's customers were in turn resold directly to consumers.

(b) Plaintiff maintained a warehouse from which it shipped orders for "Shakespeare" reels received from customers; advertised its products in numerous publications, including catalogs and magazines directed principally to consumers, and brochures directed principally to retail dealers; and, during the Christmas season, offered a special sales promotion program especially intended to appeal to retail dealers.

5. Except as noted in the following paragraph, plaintiff sold "Shakespeare" reels to its customers at a maximum discount of 50–10% (equivalent to 55%) off a suggested retail list price. Thus, an article having a suggested retail list price of $10 would be sold for $4.50 ($10 × 50% = $5 discount; $5 × 10% = $0.50 discount). Plaintiff's terms were the same to all customers, whether they engaged in retail or wholesale operations, or both. To qualify for plaintiff's 50–10% discount, a customer had to either (a) place an order for merchandise costing $2,250 (listing for $5,000), or (b) purchase that amount of merchandise in the preceding year. If the customer did not so qualify, it would receive either a 50–2%, 50–4%, 50–6%, or 50–8% discount (51%, 52%, 53%, or 54%, respectively), depend-

ing on the volume of merchandise purchased. Except for a 2% discount for prompt payment, plaintiff offered no additional discounts, such as early-order discounts, free transportation, free merchandise, or cooperative advertising to its customers.

Plaintiff made sales of "Shakespeare" reels at 60-to-70% off list totaling $2,199.15 during the period in suit to various customers and to its salesmen. Such sales were either promotional items for the Christmas season, were for salesmen's personal use or sales samples, or were items of discontinued models.

6. (a) In addition to sales of reels under its own trademark "Shakespeare," plaintiff sold reels to private-brand customers, including South Bend. South Bend then resold such reels under its "South Bend" trademark. The manufacture and sale of private-brand merchandise was common in the fishing tackle industry in 1960. Plaintiff sold reels to South Bend at a price negotiated at arm's length between the parties and determined without regard to any tax benefits under chapter 32 of the Internal Revenue Code of 1954. The price to South Bend was equivalent to about 70% off the list price of comparable "Shakespeare" reels. South Bend resold the reels strictly to jobbers and distributors, generally at a discount of 50–10% (55%) or 50–10–10% (59.5%) off a suggested retail list price. At times, other incentive discounts were given. South Bend, in addition to buying reels from plaintiff, acquired them by import and from Fishing Tackle Products Company, a domestic manufacturer owned by the same family as owned South Bend.

(b) The reels which plaintiff manufactured for South Bend were functionally identical and physically similar to models which plaintiff sold under its own "Shakespeare" trademark. Both reels were manufactured on the same assembly line, and substantially all of the materials and parts were interchangeable, though their outward appearance

was different, *e.g.*, colors and minor nonfunctional decorative features. On at least one reel model sold to South Bend, the handle construction and exterior finish differed from its "Shakespeare" counterpart. There is no evidence to what extent such differences affect reel function, life or manufacturing cost. Reels made for South Bend were impressed with the trademark "South Bend" during the manufacturing operation. All reels which plaintiff sold under its "Shakespeare" trademark were offered by plaintiff to South Bend as private-brand reels. South Bend bought about 22 of plaintiff's 63 models in 1960.

(c) In selling to private-brand customers including South Bend, plaintiff required minimum orders of $10,000 for any one fishing reel model. Plaintiff would accept orders for less, but added a $250 set-up charge. Generally, the customer was required to place its order 15 months in advance of shipment and to furnish plaintiff with reel boxes and instruction folders 30 days prior to production. South Bend's practice was to order reels from plaintiff based on anticipated sales and then withdraw reels from plaintiff's warehouse when it received orders from its own customers. Plaintiff packed reels for South Bend in bulk containers of 100 to 200 reels. Before resale, South Bend repackaged the reels in individual cartons bearing South Bend's trademark and other identifying indicia.

Plaintiff's average cost of bulk-packaging "South Bend" reels was 1.23 cents per reel. Its average cost of packaging "Shakespeare" reels in individual cartons was 10.81 cents per reel. Had plaintiff packaged "South Bend" reels in individual cartons prior to sale to South Bend, its selling price would have increased about 2.2%.

(d) Besides sales to South Bend, plaintiff sold private-brand reels to others including Sears, Roebuck & Company and Montgomery Ward Company. (Finding 3.) There is no evidence regarding (i) the nature of the reels sold to private-brand customers other than South Bend or (ii)

whether the prices for which sold were based on list prices of "Shakespeare"-brand reels.

7. (a) To show the method of distribution of fishing tackle in the industry, plaintiff put in evidence statistics collected by the American Fishing Tackle Manufacturers Association (hereafter "AFTMA") whose membership in 1960 comprised about 120 of the about 3,000 companies which manufactured or imported fishing tackle. AFTMA estimates that its membership accounts for about 65 per cent of all fishing tackle sales in this country. Members of the AFTMA independently prepare and voluntarily submit sales data to the AFTMA, which retains accountants who compile the information so furnished. The AFTMA does not instruct, advise or check with the participating members on how they determine whether their customers are wholesalers, department stores, chain stores, dealers, or other outlets, each manufacturer or importer having to make that classification for itself. Statistics compiled for the year 1960 show that 95 AFTMA members reported 64.8 percent of their collective fishing tackle sales were to organizations which they considered to be wholesalers.

William G. Balz, plaintiff's executive vice president; Andrew J. Boehm, executive director, AFTMA; and Marvin Shutt, executive director, National Sporting Goods Association, all of whom were experienced and knowledgeable about the sporting goods industry, testified that most fishing tackle sales by manufacturers in 1960 were made to wholesale distributors, thus corroborating the statistics of the AFTMA.

(b) In the fishing tackle industry in 1960, there were few wholesale distributors who simply purchased in bulk from manufacturers, stored their purchases in a warehouse, and sold them in smaller lots in arm's-length transactions exclusively to retail dealers through outside salesmen, catalogs, and other promotional materials. Rather, many buyers of fishing reels from manufacturers maintained both wholesale and retail operations. In some cases, wholesalers op-

erated their own retail stores, either directly or through subsidiary corporations. In others, wholesalers sold merchandise to independent but franchised retail dealers, in which case the dealers were usually offered preferential buying terms. Often, however, wholesalers who sold through captive or franchised retail stores also solicited business from unrelated retailers through salesmen, catalogs and the like.

Generally, wholesalers' markup on sporting goods in 1960 to unrelated retail dealers was about 9–25%. Markup was often less to retailers associated in some way with a wholesaler and varied according to the selling and distribution functions performed by the wholesaler and retailer, respectively. A detailed description of sales practices of six of plaintiff's customers in 1960 is set out in finding 10.

8. (a) Plaintiff considered Garcia Company (hereafter "Garcia") and Zebco division of Brunswick Corporation (hereafter "Zebco") its largest competitors in 1960. Garcia and Zebco accounted for about 15–20% of all fishing reel sales in the United States during the period in issue and, together with plaintiff, accounted for 35–40% of such sales.

Zebco based its prices to its customers on discounts from suggested retail list prices. About two-thirds of Zebco's sales were to wholesalers and about 10–15% to retail dealers. Zebco's basic sale price of reels to its customers was 50–10% off a suggested retail list price. However, Zebco offered additional discounts for large-quantity purchases, or for specific items such as combination rods and reels, including free merchandise, early-order discounts, and freight allowances, which typically amounted to overall discounts of 60-to-65% off the suggested retail list price. The maximum discount ever offered by Zebco in the period in question was 50–10–20–21–2–2% (equivalent to about 72%), which discount was applied to one specific item, not to everything sold by Zebco. Zebco did not offer functional discounts, *i.e.*, special or additional discounts to those of its customers who were wholesalers.

Garcia sold its products in the same manner as Zebco and at comparable discounts off suggested retail list prices. Garcia sold principally to wholesalers and chain stores.

(b) Andrew J. Boehm, executive director of AFTMA, testified that to his knowledge the discount to wholesalers by fishing reel manufacturers during the period in issue was generally 50–10–10% (equivalent to 57.5%) off a suggested retail list price. The maximum was 50–10–10–10% (equivalent to about 63.6%). Further discounts, including freight allowances and early-order discounts, may have at times been given by some manufacturers.

9. In the fishing tackle industry in 1960, suggested retail list prices of articles including fishing reels were independently set by each manufacturer or importer. There is no evidence from which to compare the suggested retail list prices established by manufacturers on comparable fishing reels, except for certain "Shakespeare" models and their "South Bend" counterparts. "Shakespeare" reels listed at the same or higher prices than comparable "South Bend" models. In general, retailers sold reels other than "Shakespeare" reels to consumers at a price between list price and 40-to-50% off list. Retailers sold "Shakespeare" reels between list price and about 33-to-40% off list.

10. Representatives of six of plaintiff's customers testified at trial.

(a) Ace Hardware Company (hereafter "Ace"), Chicago, Illinois, in 1960 sold a complete line of hard-goods merchandise to 450 franchised, independently owned retail hardware dealers. Ace did not sell goods at retail, except occasionally to accommodate its employees. Ace maintained a warehouse in which it stored goods bought from manufacturers for resale to its retail dealers at 9% markup. About one-half its sales were made by drop shipment, in which case Ace reduced its markup from 9% to 2%. The drop-shipment procedure worked as follows: Ace furnished its retail dealers with Ace Hardware Company order forms which the dealers then used to order directly from a manu-

facturer. Ace was billed for the merchandise but shipment was made directly to the retail dealer. Ace paid the manufacturer; and Ace, in turn, billed the retail dealer, adding 2% to the manufacturer's price. Ace was principally liable to the manufacturer for merchandise so purchased.

Generally, large orders of retail dealers were filled by drop shipment from manufacturers, while smaller orders were filled from the Ace warehouse. Ace was a customer of plaintiff during the period in issue, as well as a customer of Zebco and Garcia. Ace applied its 9% or 2% markup in plaintiff's merchandise as well as on the other goods it handled. However, because of plaintiff's pricing policy, Ace encouraged its retail dealers to purchase plaintiff's products by drop shipment, thereby to make the dealers more competitive in the marketplace with retailers who purchased directly from plaintiff. Ace warehoused certain of plaintiff's products, although not in depth, because of demand from time-to-time for such items by retail dealers. Plaintiff's goods which were warehoused by Ace were sold at 9% markup. During the tax period in issue, Ace purchased from plaintiff $1,724.15 worth of products, at 50–10% discount from plaintiff's suggested retail list price. There is no evidence what portion of such products was sold by drop shipment and what portion was sold through Ace's warehouse. Ace purchased products from Zebco and Garcia at about 66-to-67% off the suggested retail list price.

(b) Maurice Sporting Goods, Inc. (hereafter "Maurice"), Chicago, Illinois, in 1960 purchased sporting goods from manufacturers, for resale to retail dealers, department stores and the like. Maurice maintained a warehouse in which it stored goods, including products of plaintiff and of Zebco and Garcia. Maurice owned a retail store, Kelly Sporting Goods, in Chicago, through which it merchandised about 3% of its goods between mid-1960 and mid-1961. In 1960, Maurice sold all its goods, including plaintiff's goods, to retailers at its own cost plus a 12% markup. Maurice's sales of plaintiff's goods during the period in issue

amounted to $575.45. Maurice purchased plaintiff's goods in 1960 at 50–10% discount off plaintiff's suggested retail list price. It also purchased goods from Zebco and Garcia basically at a like discount; but further discounts in the form of free goods increased the effective discount to about 50–10–20% (64%).

(c) Faber Brothers, Inc. (hereafter "Faber"), Chicago, Illinois, in 1960 sold sporting goods to retail dealers in a five-state area of the midwest. Faber sold through salesmen and by catalog which listed several of plaintiff's models of fishing reels. Faber sold to its customer dealers at two different price levels. To members of a group called "Favorite Stores," Faber sold goods at 10% above cost. To other dealers, Faber sold at 40% off the manufacturer's suggested retail list price. Any retail store could join the Faber group and become a "Favorite Store" by paying Faber $600. "Favorite Stores" paid freight on all orders, received no discounts from Faber for prompt payment, and could not return merchandise purchased. Other retail store customers of Faber received a 2% discount for prompt payment, paid no freight charges, and could return merchandise.

Faber purchased plaintiff's goods at a discount of 50–10% off plaintiff's suggested retail list price; and Zebco's and Garcia's goods at a discount of 50-10-22% (about 65%) off suggested retail list price. Its markup on all fishing-reel items to its retail dealer customers was as above noted. Faber bought reels from plaintiff, during the period in issue, amounting to $67.77. Faber owned no retail outlets and made no sales at retail.

(d) Jack Esses Distributing Company (hereafter "Esses"), St. Louis, Missouri, in 1960 distributed general merchandise including sporting goods. Esses maintained a warehouse with a showroom, employed no outside salesmen, and sold to retail dealers including sporting goods stores, industrial customers, government agencies, and jobbers. A few retail sales were made to consumers who came to the showroom. About half of its sales were to retail dealers.

Esses bought plaintiff's goods during the period in issue at 50–10% discount off plaintiff's suggested retail list price and sold them to its customers at generally 40–to–50% off such price. Esses bought Zebco and Garcia products at 50–10% discount off the suggested retail list price, plus other incentive discounts including free goods. Such products were sold at generally 40–to–50% off suggested retail list price. Its profit on plaintiff's goods was usually between 5% and 25% of the list price, and on Zebco and Garcia goods between 15% and 25% of the list price. During the period in suit, Esses purchased goods from plaintiff amounting to $593.18.

(e) Sutcliffe Company (hereafter "Sutcliffe"), Louisville, Kentucky, in 1960 operated a wholesale sporting goods business in a multi-state area. It also operated a retail store in Louisville. Sutcliffe employed 17 salesmen who solicited orders from retail dealers and 5 salesmen who solicited orders from educational institutions. Sutcliffe published and circulated a catalog listing its products and prices. During the tax period in issue, Sutcliffe bought fishing tackle products from plaintiff and other manufacturers including Zebco and Garcia. It bought plaintiff's goods at a discount of 50–10% off plaintiff's suggested retail list price, and Zebco's and Garcia's goods at about 65% off the manufacturer's suggested retail list price. Generally, Sutcliffe resold its fishing tackle products to retailers at 40%, 40–5% (43%), or 40–10% (47%) off the manufacturer's suggested retail list price.

In 1960, Sutcliffe's purchases from plaintiff totaled $18,000. Its purchases of fishing tackle products from all manufacturers in that year totaled $1,075,000. It sold about $31,000 of its fishing tackle products through its retail store, about 18% ($5,600) of which were plaintiff's products. The balance ($12,400) of plaintiff's products was sold to independent retailers.

(f) Honus Wagner Company (hereafter "Wagner"), Pittsburgh, Pennsylvania, in 1960 was a retail sporting goods store, wholly owned by E. L. Braunstein Company

(hereafter "Braunstein"), a wholesale dealer. Braunstein purchased goods from manufacturers and in turn sold them to retail dealers or through its wholly owned retail outlet, Wagner. Braunstein added a 10% markup to the products it sold through Wagner. About 85% of Braunstein's distribution was through Wagner, about 15% through other retail dealer customers.

Braunstein bought plaintiff's products, in amount of $640.95, at 50–10% discount off plaintiff's suggested retail list price and, in 1960, sold them only through Wagner. Braunstein bought Garcia's reels at 60-to-65% off the suggested retail list price. Wagner sold plaintiff's reels at retail at 33⅓% discount off the suggested retail list price and sold Garcia's reels at 45-to-50% discount off the suggested retail list price. Wagner was not permitted to purchase goods directly from manufacturers. All purchasing was done by Braunstein, although orders for plaintiff's fishing reels were written by Wagner personnel on E. L. Braunstein Company order forms.

11. At trial, various witnesses identified 20 of plaintiff's customers (in addition to the customers described in finding 10) as being generally in the sporting goods wholesale or jobber business. Such customers are below listed, along with their purchases of "Shakespeare" reels from plaintiff for the period in issue:

Company	*Purchases*
J. S. Oshman Co., Houston, Texas	$11,682.98
Stem Distribution Co., Cleveland, Ohio	6,393.11
Younkin Sports Supply, Inc. Tampa, Florida	4,927.64
Belknap Hardware & Manufacturing Co., Louisville, Kentucky	2,196.21
Leonard Melton Co., Nashville, Tennessee	1,641.58
Harrison Wholesale Co., Chicago, Illinois	1,559.36

Company	*Purchases*
Gilbert Sporting Goods Distributor, Inc., Cincinnati, Ohio	1,274.18
Markwort Sporting Goods, St. Louis, Missouri	1,020.36
Central Sales Corp., Milwaukee, Wisconsin	604.44
Walthour & Hood Co., Atlanta, Georgia	606.63
Roberts, Sanford and Taylor Co., Sherman, Texas	596.22
NuWay Sporting Goods Co., Sioux City, Iowa	382.05
Stratton & Terstegge Co., Louisville, Kentucky	144.84
Peeler Hardware Co., Macon, Georgia	66.30
H. L. Peters, Inc., Buffalo, New York	64.91
Robinson Company, Atlanta, Georgia	52.48
C. M. McClung Company, Nashville, Tennessee	42.74
Gunning Wholesale, Inc., Wichita, Kansas	31.77
Sullivan Hardware Co., Greenville, South Carolina	25.70
J. A. Williams Company, Pittsburgh, Pennsylvania	16.44

The evidence is not clear how the above-listed companies further marketed plaintiff's "Shakespeare" reels, *i.e.*, by sale to other jobbers, to related or unrelated retailers, or to ultimate consumers.

12. None of the additional excise taxes assessed by defendant in this case were included in plaintiff's sales price of the reels with respect to which taxes were imposed, and plaintiff has not collected the tax or a portion thereof from the purchasers of the reels.

Ultimate Findings of Fact

13. Plaintiff manufactured and regularly sold "Shakespeare"-brand reels to retailers in arm's-length transactions at 51-to-55% off list price. It did not sell to ultimate consumers.

14. Plaintiff regularly sold "Shakespeare"-brand reels at 51-to-55% off list price in arm's-length transactions to buyers who were wholesale distributors of general hardware and sporting goods merchandise. Some of such distributors in turn resold the reels to independent retailers at the same markup as on other goods.[1]

15. Plaintiff regularly sold private-brand reels to South Bend Tackle Company for resale by South Bend under the "South Bend" trademark. "South Bend" reels made by plaintiff were functionally identical and physically similar to corresponding models of "Shakespeare"-brand reels. Plaintiff's price to South Bend was equivalent to about 70% off list of the corresponding "Shakespeare" model. Plaintiff's sales were arm's-length transactions and the price was determined without regard to any tax benefits under chapter 32 of the 1954 Code. Plaintiff made no sales of "Shakespeare"-brand reels to South Bend.

16. The normal method of sales of fishing tackle by manufacturers in 1960 was not to sell to retailers or at retail.

Conclusion of Law

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover and the petition is dismissed.

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[1] This finding is not based to any extent on the Sporting Goods Jobbers' Register 1960–1.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 448-65

(Filed December 5, 1968)

SHAKESPEARE COMPANY v. THE UNITED STATES

REPORT OF COMMISSIONER TO THE COURT*

George D. Webster, attorney of record, for plaintiff. *John C. Howard* and *Michael A. Doyle,* of counsel.

Gilbert W. Rubloff, with whom was *Assistant Attorney General Mitchell Rogovin,* for defendant.

Opinion

DAVIS, *Commissioner:* Plaintiff seeks to recover part of the excise taxes it paid for 1960 as a manufacturer of fishing reels.[1] Plaintiff was subject to tax under section 4161 of the Internal Revenue Code of 1954 at the rate of 10% of the price for which it sold its reels. Plaintiff sold reels bearing its "Shakespeare" trademark to volume purchasers at discounts of 51-to-55% off list, depending on quantity purchased. It offered the same price terms to all its customers. Most of plaintiff's customers were retailers. Some,

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* The opinion, findings of fact, and recommended conclusion of law are submitted under the order of reference and Rule 57(a).

[1] The Internal Revenue Service asserted a deficiency against plaintiff of $433,920.85, plus $69,805.27 interest, for additional excise taxes for the period October 1, 1960 through September 30, 1963. Plaintiff paid $20,497.44, for the period October 1, 1960 through December 31, 1960, and sues here for refund.

however, were distributors who resold to retailers. Plaintiff also sold private-brand reels to several customers who in turn resold under their own trademarks. One such customer was South Bend Tackle Company (hereafter "South Bend"), to whom plaintiff sold reels, substantially identical to "Shakespeare" reels, at 70% off list price of comparable "Shakespeare" models.

The issue is whether plaintiff is entitled under section 4216(b)(2) of the 1954 Code[2] to compute its tax liability for "Shakespeare" reels on the price for which it sold private-brand reels to South Bend. In a word, section 4216(b)(2) for the period in suit provided a special constructive sales price rule for manufacturers (otherwise qualifying for its use) who sold to retailers and one or more wholesalers. The rule is that the manufacturer's excise tax on a

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[2] Sec. 4216 * * *

(b) CONSTRUCTIVE SALE PRICE.—

* * * * * * * * * *

(2) SPECIAL RULE.—If an article is sold at retail * * * [or] to a retailer * * * and if—

(A) the manufacturer, producer, or importer of such article regularly sells such articles at retail [or] to retailers * * * as the case may be,

(B) the manufacturer, producer, or importer of such article regularly sells such articles to one or more wholesale distributors * * * in arm's length transactions and he establishes that his prices in such cases are determined without regard to any tax benefit under this paragraph,

(C) the normal method of sales for such articles within the industry is not to sell such articles at retail or to retailers, or combinations thereof, and

(D) the transaction is an arm's length transaction, the tax under this chapter shall (if based on the price for which the article is sold) be computed on whichever of the following prices is the lower: (i) the price for which such article is sold, or (ii) the highest price for which such articles are sold by such manufacturer, producer, or importer to wholesale distributors * * *.

taxable article is computed on the lesser of (1) the actual selling price of the article or (2) the highest price for which such article is sold by the manufacturer to wholesale distributors. Plaintiff says it has met all conditions necessary for application of section 4216(b)(2) and the proper constructive sales price for "Shakespeare" reels is 70% off list.

The Commissioner of Internal Revenue (hereafter "Commissioner") computed plaintiff's tax liability for "Shakespeare" reels on basis of prices equivalent to 51-to-55% off list.[3] Defendant contends this was correct because some of plaintiff's purchasers of "Shakespeare" reels at 51-to-55% off list (those who resold to retailers) were "wholesale distributors" and that the sale prices to them therefore established the "highest price" for which such articles were sold by plaintiff "to wholesale distributors," within the meaning of the statute.

Plaintiff, on the other hand, contends that because it sold "Shakespeare" reels to all its customers on equal price terms and at a maximum 55% discount off list, all its sales were in effect sales "to retailers"; and therefore South Bend was its sole "wholesale distributor." Plaintiff contends further that the normal method of sales of fishing tackle in the industry is not to sell at retail or to retailers; that sales to South Bend were arm's-length transactions; and that "Shakespeare" and "South Bend" reels are identical articles for purposes of section 4216(b)(2).

For reasons discussed below, it is held that plaintiff is not entitled to recover because its price of 51-to-55% off list is, for purposes of the statute, "the highest price * * * to wholesale distributors"; and therefore its tax liability for "Shakespeare" reels was properly computed by the Com-

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[3] There is no issue here regarding the price on which plaintiff's sales to South Bend should be taxed. Defendant agrees that the actual selling price, *i.e.*, about 70% off list, is the proper base.

missioner. It is unnecessary to discuss other issues, save one, which, as noted below, defendant raises at the threshold.

The statute

Section 4216(b) (2) was added to the 1954 Code by the Excise Tax Technical Changes Act of 1958 (hereafter "Changes Act") to supplement what is now section 4216(b) (1) (then 4216(b)). By way of background, manufacturers' excise taxes from their inception in 1932 were intended to apply as a percentage of the price at which manufacturers sold to volume purchasers, traditionally at the wholesaler level. Congress early recognized, however, that competitive inequities were created among manufacturers of like goods who sold at different levels of distribution. *E.g.*, a manufacturer which sold at retail rather than to wholesalers charged a higher price for its goods because of increased expenses of distribution at retail. Thus the excise tax paid was accordingly higher, in effect penalizing the manufacturer for its method of distribution. To correct this, Congress enacted section 4216(b) (present 4216 (b) (1).) which provides, among other things, a constructive sales price for manufacturers who sell at retail. In essence, the Commissioner is authorized to compute the tax on basis of a constructive sales price which is the price for which such articles are sold "in the ordinary course of trade by manufacturers or producers thereof." Generally, the effect of section 4216(b) (present 4216(b)(1)) is to lower the tax base on goods sold by manufacturers at retail.

Section 4216(b), however, did not include a like provision for manufacturers who sold to retailers. Many manufacturers considered this an inequity since sales to retailers, like sales at retail, entail higher costs due to increased distribution expenses. At hearings preceding enactment of the Changes Act, there was considerable testimony, and a number of proposed solutions, presented by manufacturers. Generally, the proposals would have amended section 4216

(b) to include sales "to retailers," as well as sales "at retail"; or would have eliminated expenses of distribution to retailers from the tax-base price. It was pointed out, however, that any amendment to section 4216(b) which required the Commissioner to determine prices of manufacturers in the ordinary course of trade, or costs of distribution to retailers, would create an undue administrative burden on the Internal Revenue Service. Congress therefore rejected such proposals and, instead, enacted section 4216(b)(2) which requires no administrative determination by the Commissioner of either manufacturer's price in the ordinary course of trade or manufacturer's cost of distribution to retailers or at retail. Rather, section 4216(b)(2) provides for determining tax-base price on basis of the particular sales practices of the manufacturer seeking to invoke the section.

By its terms, section 4216(b)(2) requires, among other things, that a manufacturer sell at retail or to retailers, and also to one or more wholesalers, in arm's-length transactions. If this condition is met, the inquiry then focuses on the highest price at which the manufacturer sells to wholesalers. If lower than the price at retail or to retailers, it becomes the constructive price upon which sales at retail or to retailers is based. In this way, the tax-base price is lowered to reflect more nearly the purpose of Congress to eliminate therefrom distribution costs to retailers or at retail.

Normal method of industry sales

One condition of section 4216(b)(2) is that the normal method by which manufacturers in an industry sell taxable articles must be other than at retail or to retailers. The reason for this is that Congress felt there is no substantial discrimination in tax burden among manufacturers in an industry where most sales are to retailers or at retail. Thus, only where a manufacturer sells at retail or to

retailers, in an industry predominantly selling to wholesalers or jobbers, is section 4216(b)(2) intended to apply.

As a threshold argument, defendant says plaintiff has failed to prove that most manufacturers of fishing reels in 1960 sold their products other than at retail or to retailers. Plaintiff, on the other hand, says it has proved that in 1960 most fishing tackle manufacturers sold to wholesalers. The evidence supports plaintiff. While it is admittedly difficult to prove industry selling practices, due to paucity of published information and reluctance of most manufacturers to disclose customer lists and sales practices, plaintiff has come up with trade association statistics for 1960 which are probative and reliable. (Finding 7(a).) Testimony of witnesses familiar with the fishing tackle industry in 1960 corroborate the statistics. Defendant offered no contrary evidence. Under the circumstances, therefore, plaintiff has carried its burden of proof on this point.[4]

Sales of "Shakespeare" reels to "wholesalers"

Defendant's principal argument, and one deemed dispositive here, is that plaintiff sold "Shakespeare" reels to wholesale distributors, as well as retailers, at 51-to-55% off list; and therefore such price is the "highest price" for which such articles were sold by the manufacturer "to wholesale distributors," within the meaning of section 4216(b)(2). Thus, defendant considers it immaterial that plaintiff sold comparable reels to South Bend at a lower wholesale price since it is the highest, not the lowest, wholesale

[4] The legislative history of § 4216(b)(2) shows that Congress intended the section to apply only when half or more of the sales of manufacturers in an industry were sales to other than retailers or at retail. See H.R. Rep. No. 481, 85th Cong., 2d Sess. (1958-3 Cum. Bull. 372, 394).

Later, Congress recognized the difficulty of proving industry distribution practices; and in 1962, it amended § 4216(b)(2) to obviate this requirement, except for certain industries not including the fishing tackle industry.

price which governs application of section 4216(b) (2). The evidence supports defendant and shows that, notwithstanding its sales policy of equal terms to all customers, plaintiff sold "Shakespeare" reels at 51-to-55% off list to distributors who warehoused them and sold them through catalogs and outside salesmen to retailers on a regular basis and at markups comparable to other goods.

Plaintiff says such sales were not "wholesale transactions" because the price charged was the same as the price to retailers; and that it is unrealistic and contrary to the intent and purpose of section 4216(b) (2) to consider a manufacturer's price to retailers also to be its highest price to wholesale distributors. Neither the statute and its legislative history nor the regulations support this view. The regulations[5] define "wholesale distributors" as "persons who customarily resell to others who in turn resell," a definition consistent with pertinent case law. See *West Kentucky Coal Co.* v. *Walling*, 153 F. 2d 582, 585 (6th Cir. 1946); *Zehring* v. *Brown Materials*, 48 F. Supp. 740, 743 (S.D. Cal. 1943). Several of plaintiff's customers fit this well-established definition. Furthermore, wholesale price has been defined as the price which a retailer pays in expectation of obtaining a higher price by way of profit from the ultimate consumer. *Guess* v. *Montague*, 51 F. Supp. 61, 65 (E.D. S.C. 1942). The record shows that despite plaintiff's selling policy, some wholesalers bought "Shakespeare" reels and resold them to retailers, similarly to other goods, to realize their usual profit.[6]

With respect to the purpose of the statute, plaintiff admittedly made most of its sales of "Shakespeare" reels to

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[5] Temporary Treas. Regs., 26 C.F.R. § 148.1-5(d)(1) (1960), under the Excise Tax Technical Changes Act of 1958, 72 Stat. 1275.

[6] This can no doubt be explained by the fact that some retailers in 1960 sold to consumers at or near list price. Therefore, a wholesaler, buying from plaintiff at 55% off list, could resell to a retailer at 10-25% markup and the retailer could in turn resell to a consumer at a fair profit.

retailers. Thus, to the extent that plaintiff's price of 51-to-55% off list includes costs of distribution to retailers, congressional purpose of section 4216(b) (2) is not realized. However, as above noted, Congress considered, but rejected, proposed legislation which would have directly eliminated costs of distribution to retailers from the tax-base price. While Congress may have intended section 4216(b) (2) to reach the same result, its plain meaning, as applied to the facts here, fails to do so. Courts are powerless to rewrite tax statutes, however appealing it may be. *Fitch Co.* v. *United States*, 323 U.S. 582 (1945); *Helvering* v. *Rebsamen Motors, Inc.*, 128 F. 2d 584 (8th Cir. 1942).

Plaintiff further says that even if it sold "Shakespeare" reels to wholesale distributors, the sales were *de minimis* and should be ignored. It is not clear from the record what quantity of "Shakespeare" reels passed through distributors to retailers. The evidence shows that at least four of plaintiff's customers were wholesale distributors who resold plaintiff's "Shakespeare" reels to retailers in their ordinary course of doing business. There is also evidence that about 134 of plaintiff's other customers were considered in the trade to be jobbers which purchased goods from manufacturers and resold them to retailers through catalogs and outside salesmen in multi-state areas. To what extent such jobbers resold "Shakespeare" reels to retailers is not clear. It is a fair assumption, however, based on evidence of sales practices of plaintiff's above-noted four customers, that some jobbers resold "Shakespeare" reels to retailers in their ordinary course of business. In any event, the statute does not require sales to wholesalers to be large in quantity. Rather, the legislative history indicates that Congress intended sales to even one wholesaler, if regularly made, to be sufficient to establish a wholesale price.[7]

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[7] H.R. REP. No. 481, 85th Cong., 2d Sess., *supra* (1958-3 CUM. BULL. 394); S. REP. No. 2090, 85th Cong., 2d Sess. (1958-3 CUM. BULL. 584, 607).

Finally, plaintiff says it is discriminated against vis-a-vis its competitors if it is not permitted to lower its tax base for "Shakespeare" reels to 70% off list. The record shows that in 1960 plaintiff's major competitors sold their name-brand reels primarily to wholesalers at about 60-to-65% off list. However, there is no evidence that plaintiff and its competitors set equal list prices on comparable goods, and thus no real way to compare tax bases and therefore excise tax paid. Thus, what plaintiff seeks is not an end to discrimination but a lowering of its tax base below its competitors by using as a constructive price its lowest, not highest, price to wholesale distributors, Congress intended no such result in the operation of section 4216(b)(2).

A final point: Defendant says name-brand "Shakespeare" reels and private-brand "South Bend" reels albeit physically similar, are different articles for purposes of section 4216(b)(2); and thus in no event can plaintiff's price to South Bend be the constructive price on which to tax sales of "Shakespeare" reels. In essence, defendant's argument is that because of reduced selling and advertising costs, plaintiff's price to South Bend was lower than any contemplated by Congress as a constructive "wholesale" price for name-brand goods.

This argument need not be discussed in detail. However, it is noted that the evidence shows that plaintiff realized significant savings in advertisng, distributing and packaging costs by selling reels as private-brand merchandise to South Bend rather than as "Shakespeare" reels (See finding 6.) In view of *Fitch Co.* v. *United States*, *supra*, which holds that advertising and selling costs must be included in the excise tax base; and in view of section 4216(a), 1954 Code, which says that packaging expenses must be included in the price base, there is doubt whether Congress, under the facts here, intended section 4216(b)(2) to operate to reduce the tax base on name-brand merchandise to the price

level of private-brand merchandise. The legislative history is not clear on this point, although the question of tax treatment of private-brand merchandise was noted generally during hearings on the Changes Act. See *Excise Tax Technical and Administrative Problems, Hearings Before a Subcomm. of the House Comm. on Ways and Means*, 84th Cong., 1st Sess., at 248, 397 (1955).

In sum, it is held that section 4216(b) (2) here applies; that plaintiff sold "Shakespeare" reels to wholesale distributors, its highest price being 51-to-55% off list; and that, therefore, the excise tax on "Shakespeare" reels was properly based on the sale price 51-to-55% off list.

Findings of Fact

1. Plaintiff, Shakespeare Company, is a Michigan corporation, with its principal office in Kalamazoo, Michigan. Plaintiff manufactures and sells fishing reels which are subject to the manufacturer's excise tax under section 4161 of the Internal Revenue Code of 1954.

2. On February 12, 1965, the District Director of Internal Revenue, Detroit, Michigan, asserted against plaintiff an assessment of $433,920.85, plus interest of $69,805.27, for additional excise taxes on the sale of fishing reels for the period October 1, 1960 through September 30, 1963. On February 23, 1965, plaintiff paid $20,497.44, representing the assessment for the last quarter of 1960 (October 1, 1960 through December 31, 1960), the tax period in suit. On March 18, 1965, plaintiff filed a claim for refund of such tax paid, plus interest. The petition in this court was timely filed on December 29, 1965.

3. From 1959 to 1963, plaintiff sold its fishing reels to about 5,500 customers. It sold reels under its own trademark "Shakespeare," and also to private-brand customers who in turn resold under their own trademarks. Plaintiff, by its own estimate, accounts for about 20% of the fishing reels sold in the United States. In the fourth quarter of

1960, the tax period here in issue, plaintiff made and sold 63 different models of reels under its trademark "Shakespeare" to about 4,000 customers. Sales for that quarter of both "Shakespeare" and private-brand reels amounted to $673,974.07, of which about 15% were private-brand sales to South Bend Tackle Company, Inc. (hereafter "South Bend"), a company independent of and not affiliated with plaintiff. Included in sales for the tax period in question were the following:

Purchaser	Private-brand reels	"Shakespeare"-brand reels	Total
Sears, Roebuck & Co.	$48,785.11	$4,901.45	$53,686.56
Montgomery Ward Co.	9,935.89	10,882.11	20,817.98
South Bend Tackle Co., Inc.	95,468.21	None	$95,468.21
Total	154,189.21	15,783.56	169,972.75

4. (a) During the period in issue, plaintiff employed 26 full-time commissioned salesmen (and three sales trainees), located throughout the United States, who concentrated on selling plaintiff's "Shakespeare"-brand products to retail outlets. Plaintiff's products were, however, sold to any business demonstrating an ability to pay. Plaintiff's salesmen and officers, though familiar with the general nature of its customers and their businesses, maintained no records regarding the specific distribution methods used by its customers. Of plaintiff's approximately 4,000 customers in the last quarter of 1960, 138 were listed as jobbers in the Sporting Goods Jobbers' Register 1960–1, published by The Sporting Goods Dealer, St. Louis, Missouri. The listings in the Jobbers' Register are based on information supplied by the listed firms, checked and verified by the publishers. As indicated in the Jobbers' Register, many of the jobbers sold through catalogs and outside salesmen in multi-state areas. Sales by plaintiff of "Shakespeare" reels to jobbers so listed totaled $104,587.10, ranged from $2.26

to $27,396.38, and constituted about 15% of plaintiff's total reels sales ("Shakespeare" and private-brand) for the period in issue.

Except for the six firms noted in finding 10, there is no evidence how plaintiff's customers further distributed the "Shakespeare" reels purchased from plaintiff, *i.e.*, whether sold to retailers or directly to consumers. Though one of plaintiff's officers testified that 98% of plaintiff's sales of "Shakespeare" reels were to retailers, there is no evidence based on plaintiff's customer list for the period in issue, either (a) that 98% of plaintiff's customers sold directly to consumers or (b) that 98% of the reels sold to plaintiff's customers were in turn resold directly to consumers.

(b) Plaintiff maintained a warehouse from which it shipped orders for "Shakespeare" reels received from customers; advertised its products in numerous publications, including catalogs and magazines directed principally to consumers, and brochures directed principally to retail dealers; and, during the Christmas season, offered a special sales promotion program especially intended to appeal to retail dealers.

5. Except as noted in the following paragraph, plaintiff sold "Shakespeare" reels to its customers at a maximum discount of 50–10% (equivalent to 55%) off a suggested retail list price. Thus, an article having a suggested retail list price of $10 would be sold for $4.50 ($10 × 50% = $5 discount; $5 × 10% = $0.50 discount). Plaintiff's terms were the same to all customers, whether they engaged in retail or wholesale operations, or both. To qualify for plaintiff's 50–10% discount, a customer had to either (a) place an order for merchandise costing $2,250 (listing for $5,000), or (b) purchase that amount of merchandise in the preceding year. If the customer did not so qualify, it would receive either a 50–2%, 50–4%, 50–6%, or 50–8% discount (51%, 52%, 53%, or 54%, respectively), depending on the volume of merchandise purchased. Except for a 2% discount for

prompt payment, plaintiff offered no additional discounts, such as early-order discounts, free transportation, free merchandise, or cooperative advertising to its customers.

Plaintiff made sales of "Shakespeare" reels at 60-to-70% off list totaling $2,199.15 during the period in suit to various customers and to its salesmen. Such sales were either promotional items for the Christmas season, were for salesmen's personal use or sales samples, or were items of discontinued models.

6. (a) In addition to sales of reels under its own trademark "Shakespeare," plaintiff sold reels to private-brand customers, including South Bend. South Bend then resold such reels under its "South Bend" trademark. The manufacture and sale of private-brand merchandise was common in the fishing tackle industry in 1960. Plaintiff sold reels to South Bend at a price negotiated at arm's length between the parties and determined without regard to any tax benefits under chapter 32 of the Internal Revenue Code of 1954. The price to South Bend was equivalent to about 70% off the list price of comparable "Shakespeare" reels. South Bend resold the reels strictly to jobbers and distributors, generally at a discount of 50–10% (55%) or 50–10–10% (59.5%) off a suggested retail list price. At times, other incentive discounts were given. South Bend, in addition to buying reels from plaintiff, acquired them by import and from Fishing Tackle Products Company, a domestic manufacturer owned by the same family as owned South Bend.

(b) The reels which plaintiff manufactured for South Bend were functionally identical and physically similar to models which plaintiff sold under its own "Shakespeare" trademark. Both reels were manufactured on the same assembly line, and substantially all of the materials and parts were interchangeable, though their outward appearance was different, *e.g.*, colors and minor nonfunctional decorative features. On at least one reel model sold to South

Bend, the handle construction and exterior finish differed from its "Shakespeare" counterpart. There is no evidence to what extent such differences affect reel function, life or manufacturing cost. Reels made for South Bend were impressed with the trademark "South Bend" during the manufacturing operation. All reels which plaintiff sold under its "Shakespeare" trademark were offered by plaintiff to South Bend as private-brand reels. South Bend bought about 22 of plaintiff's 63 models in 1960.

(c) In selling to private-brand customers, including South Bend, plaintiff required minimum orders of $10,000 for any one fishing reel model. Plaintiff would accept orders for less, but added a $250 set-up charge. Generally, the customer was required to place its order 15 months in advance of shipment and to furnish plaintiff with reel boxes and instruction folders 30 days prior to production. South Bend's practice was to order reels from plaintiff based on anticipated sales and then withdraw reels from plaintiff's warehouse when it received orders from its own customers. Plaintiff packed reels for South Bend in bulk containers of 100 to 200 reels. Before resale, South Bend repackaged the reels in individual cartons bearing South Bend's trademark and other identifying indicia.

Plaintiff's average cost of bulk-packaging "South Bend" reels was 1.23 cents per reel. Its average cost of packaging "Shakespeare" reels in individual cartons was 10.81 cents per reel. Had plaintiff packaged "South Bend" reels in individual cartons prior to sale to South Bend, its selling price would have increased about 2.2%.

(d) Besides sales to South Bend, plaintiff sold private-brand reels to others including Sears, Roebuck & Company and Montgomery Ward Company. (Finding 3.) There is no evidence regarding (i) the nature of the reels sold to private-brand customers other than South Bend or (ii) whether the prices for which sold were based on list prices of "Shakespeare"-brand reels.

7. (a) To show the method of distribution of fishing tackle in the industry, plaintiff put in evidence statistics collected by the American Fishing Tackle Manufacturers Association (hereafter "AFTMA") whose membership in 1960 comprised about 120 of the about 3,000 companies which manufactured or imported fishing tackle. AFTMA estimates that its membership accounts for about 65 percent of all fishing tackle sales in this country. Members of the AFTMA independently prepare and voluntarily submit sales data to the AFTMA, which retains accountants who compile the information so furnished. The AFTMA does not instruct, advise or check with the participating members on how they determine whether their customers are wholesalers, department stores, chain stores, dealers, or other outlets, each manufacturer or importer having to make that classification for itself. Statistics compiled for the year 1960 show that 95 AFTMA members reported 64.8 percent of their collective fishing tackle sales were to organizations which they considered to be wholesalers.

William G. Balz, plaintiff's executive vice president; Andrew J. Boehm, executive director, AFTMA; and Marvin Shutt, executive director, National Sporting Goods Association, all of whom were experienced and knowledgeable about the sporting goods industry, testified that most fishing tackle sales by manufacturers in 1960 were made to wholesale distributors, thus corroborating the statistics of the AFTMA.

(b) In the fishing tackle industry in 1960, there were few wholesale distributors who simply purchased in bulk from manufacturers, stored their purchases in a warehouse, and sold them in smaller lots in arm's-length transactions exclusively to retail dealers through outside salesmen, catalogs, and other promotional materials. Rather, many buyers of fishing reels from manufacturers maintained both wholesale and retail operations. In some cases, wholesalers operated their own retail stores, either directly or through

subsidiary corporations. In others, wholesalers sold merchandise to independent but franchised retail dealers, in which case the dealers were usually offered preferential buying terms. Often, however, wholesalers who sold through captive or franchised retail stores also solicited business from unrelated retailers through salesmen, catalogs and the like.

Generally, wholesalers' markup on sporting goods in 1960 to unrelated retail dealers was about 9-25%. Markup was often less to retailers associated in some way with a wholesaler and varied according to the selling and distribution functions performed by the wholesaler and retailer, respectively. A detailed description of sales practices of six of plaintiff's customers in 1960 is set out in finding 10.

8. (a) Plaintiff considered Garcia Company (hereafter "Garcia") and Zebco division of Brunswick Corporation (hereafter "Zebco") its largest competitors in 1960. Garcia and Zebco accounted for about 15-20% of all fishing reel sales in the United States during the period in issue and, together with plaintiff, accounted for 35–40% of such sales.

Zebco based its prices to its customers on discounts from suggested retail list prices. About two-thirds of Zebco's sales were to wholesalers and about 10–15% to retail dealers. Zebco's basic sale price of reels to its customers was 50–10% off a suggested retail list price. However, Zebco offered additional discounts for large-quantity purchases, or for specific items such as combination rods and reels, including free merchandise, early-order discounts, and freight allowances, which typically amounted to overall discounts of 60-to-65% off the suggested retail list price. The maximum discount ever offered by Zebco in the period in question was 50–10–20–21–2–2% (equivalent to about 72%), which discount was applied to one specific item, not to everything sold by Zebco. Zebco did not offer functional discounts, *i.e.*, special or additional discounts to those of its customers who were wholesalers.

Garcia sold its products in the same manner as Zebco and at comparable discounts off suggested retail list prices. Garcia sold principally to wholesalers and chain stores.

(b) Andrew J. Boehm, executive director of AFTMA, testified that to his knowledge the discount to wholesalers by fishing reel manufacturers during the period in issue was generally 50–10–10% (equivalent to 57.5%) off a suggested retail list price. The maximum was 50–10–10–10% (equivalent to about 63.6%). Further discounts, including freight allowances and early-order discounts, may have at times been given by some manufacturers.

9. In the fishing tackle industry in 1960, suggested retail list prices of articles including fishing reels were independently set by each manufacturer or importer. There is no evidence from which to compare the suggested retail list prices established by manufacturers on comparable fishing reels, except for certain "Shakespeare" models and their "South Bend" counterparts. "Shakespeare" reels listed at the same or higher prices than comparable "South Bend" models. In general, retailers sold reels other than "Shakespeare" reels to consumers at a price between list price and 40-to-50% off list. Retailers sold "Shakespeare" reels between list price and about 33-to-40% off list.

10. Representatives of six of plaintiff's customers testified at trial.

(a) Ace Hardware Company (hereafter "Ace"), Chicago, Illinois, in 1960 sold a complete line of hard-goods merchandise to 450 franchised, independently owned retail hardware dealers. Ace did not sell goods at retail, except occasionally to accommodate its employees. Ace maintained a warehouse in which it stored goods brought from manufacturers for resale to its retail dealers at 9% markup. About one-half of its sales were made by drop shipment, in which case Ace reduced its markup from 9% to 2%. The drop shipment procedure worked as follows: Ace furnished its retail dealers with Ace Hardware Company order forms which the dealers then used to order directly from a manu-

facturer. Ace was billed for the merchandise but shipment was made directly to the retail dealer. Ace paid the manufacturer; and Ace, in turn, billed the retail dealer, adding 2% to the manufacturer's price. Ace was principally liable to the manufacturer for merchandise so purchased.

Generally, large orders of retail dealers were filled by drop shipment from manufacturers, while smaller orders were filled from the Ace warehouse. Ace was a customer of plaintiff during the period in issue, as well as a customer of Zebco and Garcia. Ace applied its 9% or 2% markup on plaintiff's merchandise as well as on the other goods it handled. However, because of plaintiff's pricing policy, Ace encouraged its retail dealers to purchase plaintiff's products by drop shipment, thereby to make the dealers more competitive in the marketplace with retailers who purchased directly from plaintiff. Ace warehoused certain of plaintiff's products, although not in depth, because of demand from time-to-time for such items by retail dealers. Plaintiff's goods which were warehoused by Ace were sold at 9% markup. During the tax period in issue, Ace purchased from plaintiff $1,724.15 worth of products, at 50–10% discount from plaintiff's suggested retail list price. There is no evidence what portion of such products was sold by drop shipment and what portion was sold through Ace's warehouse. Ace purchased products from Zebco and Garcia at about 66-to-67% off the suggested retail list price.

(b) Maurice Sporting Goods, Inc. (hereafter "Maurice"), Chicago, Illinois, in 1960 purchased sporting goods from manufacturers for resale to retail dealers, department stores and the like. Maurice maintained a warehouse in which it stored goods, including products of plaintiff and of Zebco and Garcia. Maurice owned a retail store, Kelly Sporting Goods, in Chicago, through which it merchandised about 3% of its goods between mid-1960 and mid-1961. In 1960, Maurice sold all its goods, including plaintiff's goods, to retailers at its own cost plus a 12% markup. Maurice's sales of plaintiff's goods during the period in issue

amounted to $575.45. Maurice purchased plaintiff's goods in 1960 at 50–10% discount off plaintiff's suggested retail list price. It also purchased goods from Zebco and Garcia basically at a like discount; but further discounts in the form of free goods increased the effective discount to about 50–10–20% (64%).

(c) Faber Brothers, Inc. (hereafter "Faber"), Chicago, Illinois, in 1960 sold sporting goods to retail dealers in a five-state area of the midwest. Faber sold through salesmen and by catalog which listed several of plaintiff's models of fishing reels. Faber sold to its customer dealers at two different price levels. To members of a group called "Favorite Stores," Faber sold goods at 10% above cost. To other dealers, Faber sold at 40% of the manufacturer's suggested retail list price. Any retail store could join the Faber group and become a "Favorite Store" by paying Faber $600. "Favorite Stores" paid freight on all orders, received no discounts from Faber for prompt payments, and could not return merchandise purchased. Other retail store customers of Faber received a 2% discount for prompt payment, paid no freight charges, and could return merchandise.

Faber purchased plaintiff's goods at a discount of 50–10% off plaintiff's suggested retail list price; and Zebco's and Garcia's goods at a discount of 50–10–22% (about 65%) off suggested retail list price. Its markup on all fishing-reel items to its retail dealer customers was as above noted. Faber bought reels from plaintiff, during the period in issue, amounting to $67.77. Faber owned no retail outlets and made no sales at retail.

(d) Jack Esses Distributing Company (hereafter "Esses"), St. Louis, Missouri, in 1960 distributed general merchandise including sporting goods. Esses maintained a warehouse with a showroom, employed no outside salesmen, and sold to retail dealers including sporting goods stores, industrial customers, government agencies, and jobbers. A few retail sales were made to consumers who

came to the showroom. About half of its sales were to retail dealers.

Esses bought plaintiff's goods during the period in issue at 50–10% discount off plaintiff's suggested retail list price and sold them to its customers at generally 40-to-50% off such price. Esses bought Zebco and Garcia products at 50–10% discount off the suggested retail list price, plus other incentive discounts including free goods. Such products were sold at generally 40-to-50% off suggested retail list price. Its profit on plaintiff's goods was usually between 5% and 25% of the list price, and on Zebco and Garcia goods, between 15% and 25% of the list price. During the period in suit, Esses purchased goods from plaintiff amounting to $593.18.

(e) Suteliffe Company (hereafter "Suteliffe"), Louisville, Kentucky, in 1960 operated a wholesale sporting goods business in a multi-state area. It also operated a retail store in Louisville. Suteliffe employed 17 salesmen who solicited orders from retail dealers and 5 salesmen who solicited orders from educational institutions. Suteliffe published and circulated a catalog listing its products and prices. During the tax period in issue, Suteliffe bought fishing tackle products from plaintiff and other manufacturers including Zebco and Garcia. It bought plaintiff's goods at a discount of 50–10% off plaintiff's suggested retail list price, and Zebco's and Garcia's goods at about 65% off the manufacturer's suggested retail list price. Generally, Suteliffe resold its fishing tackle products to retailers at 40%, 40-5% (43%), or 40-10% (47%) off the manufacturer's suggested retail list price.

In 1960, Suteliffe's purchases from plaintiff totaled $18,000. Its purchases of fishing tackle products from all manufacturers in that year totaled $1,075,000. It sold about $31,000 of its fishing tackle products through its retail store, about 18% ($5,600) of which were plaintiff's products. The balance ($12,400) of plaintiff's products was sold to independent retailers.

(f) Honus-Wagner Company (hereafter "Wagner"), Pittsburgh, Pennsylvania, in 1960 was a retail sporting goods store, wholly owned by E. L. Braunstein Company (hereafter "Braunstein"), a wholesale dealer. Braunstein purchased goods from manufacturers and in turn sold them to retail dealers or through its wholly owned retail outlet, Wagner. Braunstein added a 10% markup to the products it sold through Wagner. About 85% of Braunstein's distribution was through Wagner, about 15% through other retail dealer customers.

Braunstein bought plaintiff's products, in amount of $640.95, at 50-10% discount of plaintiff's suggested retail list price and, in 1960, sold them only through Wagner. Braunstein bought Garcia's reels at 60-to-65% off the suggested retail list price. Wagner sold the plaintiff's reels at retail at 33⅓% discount off the suggested retail list price and sold Garcia's reels at 45-to-50% discount off the suggested retail list price. Wagner was not permitted to purchase goods directly from manufacturers. All purchasing was done by Braunstein, although orders for plaintiff's fishing reels were written by Wagner personnel on E. L. Braunstein Company order forms.

11. At trial, various witnesses identified 20 of plaintiff's customers (in addition to the customers described in finding 10) as being generally in the sporting goods wholesale or jobber business. Such customers are below listed, along with their purchases of "Shakespeare" reels from plaintiff for the period in issue:

Company	*Purchases*
J. S. Oshman Co., Houston, Texas	$11,682.98
Stem Distribution Co., Cleveland, Ohio	6,393.11
Younkin Sports Supply, Inc. Tampa, Florida	4,927.64
Belknap Hardware & Manufacturing Co., Louisville, Kentucky	2,196.21

Company	*Purchases*
Leonard Melton Co., Nashville, Tennessee	$1,641.58
Harrison Wholesale Co., Chicago, Illinois	1,559.36
Gilbert Sporting Goods Distributor, Inc., Cincinnati, Ohio	1,274.18
Markwort Sporting Goods, St. Louis, Missouri	1,020.36
Central Sales Corp., Milwaukee, Wisconsin	604.44
Walthour & Hood Co., Atlanta, Georgia	606.63
Roberts, Sanford and Taylor Co., Sherman, Texas	596.22
NuWay Sporting Goods Co., Sioux City, Iowa	382.05
Stratton & Terstegge Co., Louisville, Kentucky	144.84
Peeler Hardware Co., Macon, Georgia	66.30
H. L. Peters, Inc., Buffalo, New York	64.91
Robinson Company, Atlanta, Georgia	52.48
C. M. McClung Company, Nashville, Tennessee	42.74
Gunning Wholesale, Inc., Wichita, Kansas	31.77
Sullivan Hardware Co., Greenville, South Carolina	25.70
J. A. Williams Company, Pittsburgh, Pennsylvania	16.44

The evidence is not clear how the above-listed companies further marketed plaintiff's "Shakespeare" reels, *i.e.*, by sale to other jobbers, to related or unrelated retailers, or to ultimate consumers.

12. None of the additional excise taxes assessed by defendant in this case were included in plaintiff's sales price of the reels with respect to which taxes were imposed, and plaintiff has not collected the tax or a portion thereof from the purchasers of the reels.

Ultimate Findings of Fact

13. Plaintiff manufactured and regularly sold "Shakespeare"-band reels to retailers in arm's-length transactions at 51-to-55% off list price. It did not sell to ultimate consumers.

14. Plaintiff regularly sold "Shakespeare"-brand reels at 51-to-55% off list price in arm's-length transactions to buyers who were wholesale distributors of general hardware and sporting goods merchandise. Some of such distributors in turn resold the reels to independent retailers at the same markup as on other goods.

15. Plaintiff regularly sold private-brand reels to South Bend Tackle Company for resale by South Bend under the "South Bend" trademark. "South Bend" reels made by plaintiff were functionally identical and physically similar to corresponding models of "Shakespeare"-brand reels. Plaintiff's price to South Bend was equivalent to about 70% off list of the corresponding "Shakespeare" model. Plaintiff's sales were arm's-length transactions and the price was determined without regard to any tax benefits under chapter 32 of the 1954 Code. Plaintiff made no sales of "Shakespeare"-brand reels to South Bend.

16. The normal method of sales of fishing tackle by manufacturers in 1960 was not to sell to retailers or at retail.

Recommended Conclusion of Law

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover and the petition is dismissed.

APPENDIX C

IN THE UNITED STATES COURT OF CLAIMS

11-61	Les B. Polny	
14-65	Waterman, Largen & Co., Inc.	
448-65	Shakespeare Company	v.
245-67	Martin-Marietta Corporation	The
128-68	John C. Bennett	United
227-68	Americo Mosca	States
307-68	William D. Stoddart, III	
371-68	William D. Jones	

Before COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, Judges.

Order

These cases come before the court on motions to reopen, for rehearing and reargument, for amendment of judgment or a new trial, for reconsideration, to reinstate and for further relief under Rules 151 and 152 [prior to September 1, 1969 Rules 68 and 69] of the Rules of this court and, on consideration thereof,

IT IS ORDERED this 20th day of February, 1970, that said motions be and the same are denied as follows:

11-61 Les B. Polny. Petitioner's request that the court support his plea for justice and relief from the order dated June 20, 1969.

14-65 Waterman, Largen & Co., Inc. Defendant's motion for rehearing and reargument.

448-65 Shakespeare Company. Plaintiff's motion for amendment of judgment or a new trial.

245-67 Martin-Marietta Corporation. Defendant's motion for reconsideration of decision.

128-68 John C. Bennett. Plaintiff's motion to reinstate.

227-68 Americo Mosca. Plaintiff's motion for a rehearing to alter the opinion of the court decided on November 14, 1969.

307-68 William D. Stoddart, III. Plaintiff's motion for rehearing to alter judgment.

371-68 William D. Jones. Plaintiff's motion for reconsideration, filed November 19, 1969.

BY THE COURT

s/ WILSON COWEN
Chief Judge

APPENDIX D

CONSTITUTION, FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Internal Revenue Code of 1954:

SEC. 4161. IMPOSITION OF TAX.

There is hereby imposed upon the sale by the manufacturer, producer, or importer of the following articles (including in each case parts or accessories of such articles sold on or in connection therewith, or with the sale thereof) a tax equivalent to 10 percent of the price for which so sold:

* * * * * * * * * * *

Fishing rods, creels, reels and artificial lures, baits and flies.

* * * * * * * * * * *

(26 U.S.C. 1964 ed., Sec. 4161.)

SEC. 4216 [as amended by Sec. 115, Excise Tax Technical Changes Act of 1958, P. L. 85-859, 72 Stat. 1274] DEFINITION OF PRICE.

(a) *Containers, Packing and Transportation Charges.*— In determining, for the purposes of this chapter, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature,

and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this chapter, whether or not stated as a separate charge. A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established to the satisfaction of the Secretary or his delegate in accordance with the regulations.

(b) *Constructive Sale Price.*

(1) *In general.*—If an article is—

(A) sold at retail,

(B) sold on consignment, or

(C) sold (otherwise than through an arm's length transaction) at less than the fair market price, the tax under this chapter shall (if based on the price for which the article is sold) be computed on the price for which such articles are sold, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Secretary or his delegate. In the case of an article sold at retail, the computation under the preceding sentence shall be on whichever of the following prices is the lower: (i) the price for which such article is sold, or (ii) the highest price for whch such artcles are sold to wholesale distributors, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Secretary or his delegate. * * * . . .

(2) Special rule.—If an article is sold at retail, to a retailer, or to a special dealer (as defined in paragraph (3)), and if—

(A) the manufacturer, producer or importer of such article regularly sells such articles at re-

tail, to retailers, or to special dealers, as the case may be,

(B) the manufacturer, producer, or importer of such article regularly sells such articles to one or more wholesale distributors (other than special dealers) in arm's length transactions and he establishes that his prices in such cases are determined without regard to any tax benefit under this paragraph.

(C) the normal method of sales for such articles within the industry is not to sell such articles at retail or to retailers, or combinations thereof, and

(D) the transaction is an arm's length transaction,

the tax under this chapter shall (if based on the price for which the article is sold) be computed on whichever of the following prices is the lower: (i) the price for which such article is sold, or (ii) the highest price for which such articles are sold by such manufacturer, producer, or importer to wholesale distributors (other than special dealers).

* * *

(26 U.S.C. 1964 ed., Sec. 4216.)

Temporary Treasury Regulations Under the Excise Tax Technical Changes Act of 1958:

SEC. 148.1-5 *Constructive sale price.*

* * *

(c) *Special rule*—(1) *Basis for tax.* Where a manufacturer, producer, or importer sells an article at retail, to a retailer, or to a special dealer, and the conditions specified in subparagraph (2) of this paragraph are met, a special constructive sale price rule is provided for computation of the tax. This rule pro-

vides that the tax is to be based on the lower of the following prices: (i) the actual price for which the article is sold; or (ii) the highest price for which such articles are sold by such manufacturer, producer, or importer to wholesale distributors (other than special dealers).

(2) *Conditions governing applicability of special rule.* In order to qualify for application of the special constructive sale price rule to the sale by the manufacturer, producer, or importer of an article at retail, to a retailer, or to a special dealer, the following four conditions must be satisfied.

(i) The manufacturer, producer, or importer of the article must regularly sell such articles at retail, to retailers, or to special dealers, as the case may be.

(ii) The manufacturer, producer, or importer of the article must regularly sell such articles to one or more wholesale distributors (other than special dealers) in arm's length transactions, and must establish that his prices in such cases are determined without regard to any tax benefit under this paragraph resulting from a reduction in the tax base for his sales at retail, to retailers, or to special dealers.

(iii) The normal method of sales within the industry embracing the article is not to sell at retail, or to retailers, or both.

(iv) The sale at retail, to a retailer, or to a special dealer must be an arm's length transaction.

(3) *Requests for determination.* In any case in which a manufacturer, producer, or importer desires a determination as to the application of this paragraph, he may request such a determination from the Commissioner. The request shall contain complete and detailed information with respect to each of the conditions specified in subparagraph (2) of this paragraph

to assist the Commissioner in determining whether the constructive sale price provisions of this paragraph apply, such as data which will show the normal method of sales for the article within the industry by manufacturers, producers, and importers (including the dollar volume of sales at various distribution levels), and the source of such data; evidence as to the regularity with which sales of such articles are made by the manufacturer, producer, or importer at retail, to retailers, or to special dealers; information that the prices of the manufacturer, producer, or importer to wholesale distributors have been determined without regard to any tax benefit under the special rule of this paragraph, etc.

(d) *Definitions.* For purposes of this section—

(1) *Wholesale distributors.* The term "wholesale distributors" means persons who customarily resell to others who in turn resell.

APPENDIX E

IN THE UNITED STATES COURT OF CLAIMS

No. 448-65

(Filed December 5, 1968)

SHAKESPEARE COMPANY, *Plaintiff*,

v.

THE UNITED STATES, *Defendant*.

Order Admitting Defendant's Exhibit 17 Into Evidence

At trial, defendant offered into evidence as defendant's Exhibit 17, the Sporting Goods Jobbers' Register, 1960-1961, published by The Sporting Goods Dealer, St. Louis, Missouri. Plaintiff objected; the objection was sustained.

The exhibit was filed pursuant to Rule 49(c)(2). (Tr. 870-886.) After reconsideration,

IT IS HEREBY ORDERED that defendant's Exhibit 17 is admitted into evidence to the same extent, and to be given the same probative weight, as plaintiff's Exhibits 10A through 10E. (Tr. 510-535.) See findings of fact 4(a) and 7(a) in the Commissioner's report filed this date.

JAMES F. DAVIS
James F. Davis
Commissioner

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 176

SHAKESPEARE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The findings of fact, conclusion of law and opinion of the Court of Claims (Pet. App. 1a-24a) are reported at 419 F. 2d 839.

JURISDICTION

The judgment of the Court of Claims was entered on November 14, 1969 (Pet. App. 24a). A petition for rehearing was denied on February 20, 1970 (Pet. App. 48a-49a). The petition for a writ of certiorari was filed on May 21, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the Court of Claims correctly held that petitioner's price to retailers for its fishing reels was the same as its highest price to wholesalers, so that the excise sales tax base for its sales to retailers was the actual price charged.

2. Whether petitioner's due process rights were violated by the *ex parte* admission after trial of evidence originally excluded at trial but which was not relied upon by the Court of Claims.

STATUTES INVOLVED

Sections 4161 and 4216 of the Internal Revenue Code of 1954 are set forth in Appendix D to the petition (Pet. App. 50a-52a).

STATEMENT

Petitioner manufactures and sells fishing reels subject to the manufacturers excise tax imposed by Section 4161 of the Internal Revenue Code of 1954. In the fishing tackle industry in 1960, there were few exclusively wholesale distributors. Many buyers of fishing reels from manufacturers maintained both wholesale and retail operations. Petitioner made no sales to ultimate consumers but sold its Shakespeare brand reels to wholesalers and retailers alike at the same price to all purchasers of 51 to 55 percent off its suggested retail list price. In addition, approximately 15 percent of petitioner's gross sales were made at 70 percent off list price to South Bend Tackle Company, which resold the reels under its own private brand

name. Fourth quarter sales in 1960 were made to over 4,000 trade customers and amounted to a total of $674,000, of which 15 percent were private brand sales to South Bend. Petitioner thus regularly sold Shakespeare reels at 51 to 55 percent off list to distributors who sold them to retailers on a regular basis at markups comparable to those on other goods. (Pet. App. 8a, 11a, 12a, 16a, 18a-22a, 24a.)

Section 4216(b)(2) of the Code entitles a manufacturer of taxable articles, who sells to wholesalers and retailers, to use as his excise tax base for sales to retailers the actual sales price or his highest price to wholesale distributors, whichever is the lesser. Petitioner claimed that its highest wholesale price was the 70 percent off list price it charged on private brand sales to South Bend, and, therefore, that its excise tax base for name brand sales was its sales price to South Bend. The Commissioner of Internal Revenue based the excise tax on petitioner's brand name sales on actual sales prices (Pet. App. 4a) and assessed a deficiency for the period from October 1, 1960, to September 30, 1963, of $433,920.85 (Pet. App. 2a). Petitioner paid the deficiency for the fourth quarter of 1960 and brought this suit for refund (Pet. App. 2a).

The Court of Claims sustained the Commissioner, holding that the highest price for which petitioner sold to wholesale distributors was 51 to 55 percent off list, not its lower wholesale price to South Bend (Pet. App. 8a). Having disposed of the case on this ground, the court found it unnecessary to pass on the government's alternative contention that petitioner's

name brand reels and the private brand reels were different articles for the purpose of Section 4216(b)(2), so that, in no event, could the private brand price be used as the base for determining the excise on name brand sales. The court noted, however, that it was doubtful whether the private brand sales to South Bend were comparable to the sales of Shakespeare models, since some of the ordinary costs of manufacture, such as advertising, distributing and selling expenses, includible in the excise tax base, were not included in the private brand sales price (Pet. App. 10a-11a).

Petitioner also raised a procedural due process claim, arising out of the fact that, in determining petitioner's highest wholesale price, the Court of Claims Trial Commissioner had relied in part (Pet. App. 35a) upon evidence that had been excluded at trial. The Court of Claims, however, expressly based its finding of the highest wholesale price on other evidence in the record (Pet. App. 24a, n.1).

ARGUMENT

The decision below is correct. There is no conflict of decisions or other reason for review.

1. The Court of Claims' conclusion that the highest price for which petitioner sold at wholesale was 51 to 55 percent off list is the only conclusion compatible with the facts of this case. While most of petitioner's name brand sales were to retailers, it also regularly made name brand sales to wholesalers at the same price. The court below correctly held (Pet. App. 8a)

that there is nothing in the statute, the legislative history, or the regulations that suggests that wholesale sales are not to be considered as such where retail sales are made at the same price.

There is likewise no basis for petitioner's contention that its wholesale sales at 51 to 55 percent off list are to be disregarded for purposes of Section 4216 (b) (2), because they were made in insufficient volume to establish a wholesale price (Pet. App. 9a-10a). The policy of the statute is clear. It affords relief to manufacturers who sell to retailers and wholesalers by taking the manufacturer's price to wholesalers as the excise tax base. But, as the legislative history shows (Pet. App. 5a-6a), Congress believed it would impose an undue administrative burden upon the Internal Revenue Service (and reviewing courts) to determine a constructive price to wholesalers based on any specific volume of sales to wholesalers, where the manufacturer has himself established his maximum wholesale price by regular sales to even one wholesaler. The instant case illustrates the wisdom of the statutory policy; in view of the marketing practices of the fishing tackle industry, petitioner's position, if sustained, would require a remand of the case for an examination of the businesses of 4,000 customers to determine what proportion of petitioner's dollar sales was made to distributors for resale to independent retailers (cf. Pet. App. 21a).

2. Contrary to petitioner's assertion (Pet. 7), no important question of statutory construction is presented. The problem of the relationship between name brand sales and private brand sales suggested

by *F. W. Fitch Co.* v. *United States*, 323 U.S. 582 (Pet. 8, 14-16), is not involved here, since the decision of the Court of Claims does not rest upon the comparability of the sales to South Bend to the Shakespeare model sales—a question which the court did not finally resolve (Pet. App. 10a-11a)—but on its finding (Pet. App. 24a) that petitioner's sales price to South Bend was not its highest wholesale price.[1] That finding is not to be set aside on petitioner's claim (Pet. 18) that its price of 70 percent off list to South Bend is comparable to the 60-65 percent off list price which its competitors use as their excise tax base. As the court below explained (Pet. App. 10a), the percentage off list prices cannot really be compared, because there is no evidence that petitioner and its competitors set equal list prices on comparable merchandise.

There is no conflict with other circuits as to the excise tax meaning of the terms "wholesaler" and "retailer." The court here, though citing other cases (Pet. App. 8a), applied the very definition of a wholesaler set forth in the cases cited by petitioner—a person who customarily resells to others who, in turn, resell. See *Roland Co.* v. *Walling*, 326 U.S. 657, 674-675. The cases with which petitioner asserts conflict (*Gellman* v. *United States*, 235 F. 2d 87 (C.A. 8); *Torti* v. *United States*, 249 F. 2d 623 (C.A. 7);

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[1] Petitioner's reliance (Pet. 17) on *FTC* v. *Borden Co.*, 383 U.S. 637, is misplaced. That case involved the Robinson-Patman Act (15 U.S.C. 13a), and the distinctions there drawn by the Court between private brand and name brand goods have no bearing here.

United States v. *Redmond*, 328 F. 2d 707 (C.A. 6)) (Pet. 9-10) all are distinguishable in any event. They involve the question whether the retailers excise tax applies to sales in bulk made, for example, to industrial concerns for distribution as awards or prizes to their employees. In each case, it was held that the sellers were not retailers. Retailers were distinguished because they sell in small lots to the ultimate consumer for his personal or family use. The definition of retailers, drawn for purposes of determining the applicability of the retailers excise tax, does not convert a small-scale wholesaler into a retailer for manufacturers excise tax purposes, as petitioner contends (Pet. 9-12).

Nor is there any conflict with *Power Brake Equipment Co.* v. *United States*, 68-2 U.S.T.C., par 15,850 (D. Ore.), affirmed *per curiam*, 70-1 U.S.T.C., par. 15,937 (C.A. 9), upon which petitioner also relies (Pet. 12-14). Petitioner's argument rests on the assumption (Pet. 12) that its excise tax base for name brand sales was computed by the court below by reference to its price to retailers. That is not a correct reading of the decision below. The Court of Claims recognized petitioner's right to use its highest price to wholesalers as the base for its sales to retailers, and determined that price to be 51 to 55 percent off list. In *Power Brake*, on the other hand, as petitioner acknowledges (Pet. 13), the manufacturer's price to wholesale distributors was established, and the question was whether the taxpayer nevertheless had to use the higher actual prices for other sales, some of which were to "dealers" (not identified as wholesal-

ers or retailers) and others to ultimate consumers.[2] As the Court of Claims pointed out (Pet. App. 6a, n.4), *Power Brake* involved taxable periods in 1957 and 1958 and arose under Section 4216(b)(1), which provided relief for sales "at retail" (to the ultimate consumer) and not for sales to retailers. Relief for sales to retailers was provided beginning in 1959 by Section 4216(b)(2), which is the provision here in issue (see Pet. App. 4a-6a). The *Power Brake* decision fixing the excise tax base for the sales to "dealers" at the manufacturer's established wholesale price is therefore not apposite here. Were *Power Brake* to arise under present law, the excise tax base for sales to retailers would be determined under Section 4216(b)(2). There is thus no reason for review by this Court even if *Power Brake* were deemed in conflict with the decision below.

3. Petitioner's due process rights were not violated by the post trial *ex parte* order of the Trial Commissioner (Pet. App. 54a-55a) admitting an exhibit (Jobbers' Register, Deft. Ex. 17, Tr. 874) into evidence after it was initially excluded at trial. The Court of Claims expressly noted (Pet. App. 24a, n.1) that its finding of petitioner's highest wholesale price was not based to any extent on this exhibit. This leaves, at most, only a question as to whether the balance of the record evidence on the point supports the finding—a question not raised by petitioner and not suitable for further review in any event.

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[2] At trial, the government conceded the taxpayer's right to use the established wholesale price on sales to ultimate consumers.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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